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IN THE
SUPREME COURT OF THE UNITED STATES

GREGG C. REVELL,

Petitioner,

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY; SCOTT ERICKSON,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether a firearm is "readily accessible" within the meaning of 18 U.S.C. § 926A where it is inside a locked hard case within an interstate traveler's luggage.

2) Whether the state, under the Due Process Clause of the Fourteenth Amendment, must provide notice and opportunity for a hearing after a criminal charge is dismissed when it retains property which was seized in the cours

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OPINION BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is published at 598 F.3d 128 (3rd Cir. 2010) and is reprinted in the Appendix ("App.") at App. 1a. The opinions of the district court are not reported and are reprinted in the Appendix at App. 26a (Opinion of 3/31/09) and App. 49a (Opinion of 6/29/07).

JURISDICTION

The United States Court of Appeals for the Third Circuit affirmed the judgment of the district court in a published decision on March 22, 2010. 598 F.3d 128 (3rd Cir. 2010); App. 1a. A timely filed petition for rehearing was denied on April 20, 2010. App. 71a. On July 8, 2010, Justice Alito granted Revell's timely motion to extend the time to file this petition until August 18, 2010. This Court has jurisdiction under 28 U.S.C.§ 1254(1).

CONSTITUTIONAL PROVISION

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const., Fourteenth Amendment, § 1

STATUTE

> Notwithstanding any other provision of any law or any rule or regulation of a State or any political subdivision thereof, any person who is not otherwise prohibited by this chapter from transporting, shipping, or receiving a firearm shall be entitled to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle: Provided, That in the case of a vehicle without a compartment separate from the driver's compartment the firearm or ammunition shall be contained in a locked container other than the glove compartment or console.

18 U.S.C. § 926A.

STATEMENT OF THE CASE

Overview

The court of appeals has effectively repealed a key provision of 18 U.S.C. § 926A (enacted as part of the Firearms Owners Protection Act of 1986 ("FOPA"), Pub.L. 99-308, 100 Stat. 449 (1986)) by ruling that an airline traveler stranded overnight through no fault of his own is subject to arrest and prosecution under local law if he has luggage containing unloaded firearms and ammunition in locked hard cases and that were properly declared -- precisely the burden Congress thought it eliminated by enacting FOPA.

The ruling makes interstate travelers vulnerable to the inconsistent patchwork of local firearm laws that FOPA was intended to address. Those impacted include anyone stranded overnight with luggage containing unloaded firearms and ammunition in locked hard cases; anyone who must retrieve and recheck such luggage to make a connecting flight at another terminal or airport; and anyone traveling by vehicle with such luggage on a multi-day journey requiring an overnight stay.

FOPA was intended to permit law-abiding firearm owners to travel freely with firearms throughout the United States without falling victim to inconsistent local regulation by complying with simple, uniform rules established by Congress to facilitate safe and secure interstate travel.

By effectively finding that mere possession of luggage containing unloaded firearms and ammunition in locked hard cases means that the firearms are "readily accessible" (and therefore not subject to FOPA's protection), the court of appeals has thwarted congressional intent and rendered key provisions of § 926A meaningless.

In addition, the court of appeals improperly failed to accept as true all of the factual allegations in the complaint, and made speculative inferences construing the pleadings in the least favorable light to Revell. The Court also legislated a substitute rule, improperly suggesting that firearms must be surrendered to law enforcement during delayed travel to comply with FOPA, even though that would waive Fifth Amendment rights and violate state law (which precludes transfer back to the traveler).

This Court should grant the writ not only because the case raises important questions of federal law, but because it creates a circuit-wide region in which the freedom to travel with firearms is severely limited and imperiled, in direct contravention of FOPA. Although there is no split in the circuits, as a practical matter, a split on this issue is highly unlikely ever to occur, because there are very few jurisdictions like New Jersey where the laws are such that FOPA is significant (so litigation that could result in a split is improbable outside those jurisdictions). And, in the few jurisdictions like New Jersey where FOPA is significant, court decisions have been hostile toward it, promising deeper entrenchment on the issue, and further suggesting that an eventual circuit split is

highly unlikely. Allowing the court of appeals decision to stand permits the creation of an isolated enclave where FOPA's key protections have been summarily erased and persons traveling with firearms are imperiled by an inconsistent patchwork of laws, with no recourse.

Facts

On March 31, 2005, at the Salt Lake City, Utah airport, Petitioner Revell, then 57 years old, checked his luggage with Northwest Airlines for flights from Salt Lake City to Allentown, Pennsylvania with connections in Minneapolis/St. Paul and Newark, New Jersey. Revell was traveling to retrieve a vehicle he purchased and drive it back from Pennsylvania to his home state of Utah, and was traveling with a firearm for personal protection. Revell had a valid Utah concealed firearm permit, which was recognized in Pennsylvania. As required by federal law, Revell declared that, inside his bag to be checked through to his final destination (Allentown, Pennsylvania), he had an unloaded firearm in a locked hard case container and ammunition in a separate locked hard case container. Also as required by federal law, he signed an orange firearm declaration tag, which was put inside the locked hard case with the firearm.

The connecting flight from Minneapolis/St. Paul to Newark on Continental Airlines was 45 minutes late, so Revell missed the final connecting flight from Newark to Allentown. As the next available connection would not leave until several hours later, at 8 p.m. that night, he booked that connection and

waited in Newark Airport without leaving the secure area of the airport. When it was near 8 p.m., Revell gave the attendant his ticket at the gate and went through the door to enter the airplane. To his surprise, he boarded a bus which was to drive him and other passengers to the Allentown airport.

After being seated on the bus, he discovered from the driver that his luggage was not on board. Revell got off the bus and went to the Continental Airlines lost luggage area, outside of the secure area, to retrieve his luggage. At the lost luggage area, Revell was informed that his luggage had not been placed on the bus going to Allentown because the tag on the luggage mistakenly showed that it was only checked to Newark. By the time he retrieved his luggage, the bus to Allentown had already departed. Because there were no more available connections to Allentown until 9:45 a.m. the following morning (April 1, 2005), Revell went directly to, and stayed the night at, the Airport Sheraton Hotel at th expense of the airline. His luggage (inside of which were both locked hard case containers) was placed in the rear, baggage area of the van by the driver of the hotel shuttle van. The bags were not directly accessible from the passenger compartment of the hotel shuttle van as there were two seats between him and the bags and he would have had to climb over the rear seat to get to the bags. Revell did not open either of the locked hard case containers while he was in New Jersey.

The next morning (April 1, 2005), Revell went directly to the airport from the Airport Sheraton Hotel. The bags were again placed in the rear, baggage area

of the van by the driver of the hotel shuttle van where they were not directly accessible from the passenger compartment of the van. He arrived back at the airport at 8:30 a.m. and went to the ticket counter to check his bag; he again declared (as required by federal law) that he had a firearm and ammunition in the luggage, that the firearm was unloaded and in a locked hard case, and that the ammunition was in a separate locked hard case. The agent told Revell to take his bag over to the TSA area to have it x-rayed. Revell again declared the firearm and ammunition. After the bag went through the x-ray machine, the TSA agent on the other end of the machine opened the bag, took out the two locked hard case containers, and asked for the keys to the containers, which Revell gave him. The agent opened the cases and took out the firearm and ammunition. The orange declaration form was still in the hard case with the firearm.

After about 20 minutes, several Port Authority police officers (including Officer Scott Erickson) asked Revell to come to the back of the TSA area, away from the other passengers, where they questioned him about the firearm and ammunition. Revell told them that he had declared the items and was just passing through NJ en route to Allentown, PA. He showed them his Utah concealed firearm permit and driver's license. Officer Erickson testified during his deposition that Revell told him that "he picked up the bag at Newark because he missed his flight, and went out of the airport" and that he went to a hotel that night." Concerning what Revell did with his bag after he picked it up, Officer Erickson testified that Revell "didn't go into detail to the best of my knowledge."

Revell was arrested by Officer Erickson pursuant to state law for possession of a handgun without a permit (N.J.S. § 2C:39-5(b)) and possession of hollow point ammunition (N.J.S. § 2C:39-3(f)), handcuffed, and escorted through the airport by several Port Authority police officers to a police car. The firearm, holster, locks, hard case containers, and ammunition were seized by the Port Authority Police pursuant to established policy of the Port Authority.

Revell five nights incarcerated until he was able to make bail; one day at the Port Authority Jail and then another four days at the Essex County Jail, where (among other things) he was inoculated against his will and denied access to his blood pressure medication. He was finally released on bond on April 5, 2005.

The Essex County Prosecutor administratively dismissed the charges on August 2, 2005. The firearm, holster, locks, hard case containers, and ammunition were not returned to Revell until more than three years later, on July 24, 2008, after repeated demands by counsel.

Proceedings in the Courts Below

On January 27, 2006, Revell and the Association of New Jersey Rifle & Pistol Clubs, Inc. (representing its non-resident members) filed an action in the United States District Court for the District of New Jersey against the Port Authority and Port Authority Police Officer Erickson seeking recovery (damages and injunctive relief for Revell, and injunctive relief for the Association requiring the Port Authority to follow federal law) under 42 U.S.C. § 1983. Jurisdiction was founded on 28 U.S.C. § 1331 as the action arose under the Constitution and laws of the United States. The complaint had four (4) counts.

The first count alleged that the Port Authority and Officer Erickson deprived Revell of the rights, privileges, or immunities secured by 18 U.S.C. § 926A because Revell was entitled to transport a firearm and ammunition through New Jersey, notwithstanding N.J.S. § 2C:39-5(b)(prohibiting possession of a handgun without a permit) and N.J.S. § 2C:39-3(f)(prohibiting possession of hollow point ammunition) as: he was not prohibited by Chapter 44 of Title 18 of the United States Code from transporting, shipping, or receiving a firearm; he was transporting a firearm for a lawful purpose from Utah, where he could lawfully possess and carry such firearm, to Pennsylvania, where he could lawfully possess and carry such firearm; during the transportation of the firearm, the firearm was unloaded; and, during the transportation of the firearm, neither the firearm nor the ammunition were readily accessible, or directly accessible from the

passenger compartment of the aircraft or the bus in which he transported the firearm and ammunition. Revell sought damages for depriving him of the rights, privileges, or immunities secured by 18 U.S.C. § 926A.

The second count alleged that the Port Authority and Officer Erickson deprived Revell of property without due process of law, under the Fourteenth Amendment, by retaining, without notice and opportunity for a hearing, the firearm, holster, locks, hard case containers, and ammunition seized from him. Revell sought damages for depriving him of the rights, privileges, or immunities secured by the Fourteenth Amendment.

The third count alleged that the Port Authority and Officer Erickson deprived Revell of property without due process of law, under the Fourteenth Amendment, by retaining, without notice and opportunity for a hearing, the firearm, holster, locks, hard case containers, and ammunition seized from him. Revell sought an order directing that the property be returned.

The fourth count, for which the Association was the only plaintiff, alleged that non-resident members of the Association, who are entitled to transport a firearm and ammunition through New Jersey pursuant to 18 U.S.C. § 926A, intended to transport firearms and hollow point ammunition through New Jersey yet are subject to arrest and prosecution under under Port Authority policy and practice pursuant to N.J.S. § 2C:39-5(b) and N.J.S. § 2C:39-3(f); that there exists a credible threat of prosecution for violation of

N.J.S. § 2C:39-5(b) and N.J.S. § 2C:39-3(f) for non-resident members of the Association who intend to transport firearms and hollow point ammunition through New Jersey and who are entitled to transport a firearm and ammunition through New Jersey pursuant to 18 U.S.C. § 926A; and that the Port Authority and Erickson are depriving non-resident members of the Association who are entitled to transport a firearm and ammunition through New Jersey pursuant to 18 U.S.C. § 926A of rights, privileges, or immunities secured by 18 U.S.C. § 926A. The Association sought an injunction enjoining the Port Authority and Erickson from enforcing N.J.S. § 2C:39-5(b) and N.J.S. § 2C:39-3(f) against its non-resident members who are entitled to transport a firearm and ammunition through New Jersey pursuant to 18 U.S.C. § 926A.

Erickson moved to dismiss Revell's claims pursuant to Fed. Rule Civ. Pro. 12(b)(6) for failure to state a claim, and the Port Authority (which had answered the complaint) moved for judgment on the pleadings pursuant to Fed. Rule Civ. Pro. 12(c), as to Counts I-III of the complaint; no motion was made with respect to Count IV, the only count involving the Association.

On June 29, 2007, the district court granted the motions as to Counts I-III, with leave to amend, and, *sua sponte*, dismissed Count IV, without leave to amend, on the ground that the Association did not have standing to pursue its claim on behalf of its

members.[1] App. 49a.

As to Count I, which sought to recover monetary damages and injunctive relief pursuant to 42 U.S.C. § 1983 for a violation of a statutory right secured by 18 U.S.C. § 926A, the district court concluded that § 926A did not create a private right of action, but, because "the facts alleged could be sufficient to state a § 1983 claim for an unreasonable arrest and seizure of property in violation of the Fourth Amendment" (App. 64a (Opinion (6/29/07) at 11)), permitted Revell to amend his complaint "to substitute a § 1983 claim for a violation of his Fourth Amendment rights in place of his § 1983 claim for a violation of 18 U.S.C. § 926A . . . ." App. 70a (Opinion (6/29/07) at 15).

With respect to Counts II and III, which claimed that the Port Authority and Officer Erickson, acting under color of State law, had deprived Revell of his property (firearm, ammunition, holster, locks, and hard case containers) without due process of law, as guaranteed by the Fourteenth Amendment, and sought redress in the form of monetary relief (Count II) and injunctive relief (Count III), the district court granted leave for Revell to reframe these counts as "a claim alleging that the Port Authority's post-

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[1] The Association sought and obtained permission to take an interlocutory appeal from the dismissal to the United States Court of Appeals for the Third Circuit, which, by order of April 1, 2009, reversed and remanded, holding that the District Court had abused its discretion and that the Association had standing to pursue its claim on behalf of its members. No. 07-3655. That claim is pending before the district court.

deprivation remedies for the return of seized property are constitutionally inadequate." App. 67a (Opinion (6/29/07) at 14). Revell timely filed an amended complaint, recasting Counts I-III as permitted by the district court.

In the amended complaint, Count I asserted a § 1983 claim for damages pursuant to the Fourth Amendment; Count II pled a claim for damages, alleging that Port Authority deprived Revell of his property without due process of law. In July, 2008, Revell voluntarily dismissed Count III after his property was finally returned.

In August, 2008, after discovery was completed, the Port Authority and Erickson filed a motion for summary judgment as to Counts I-II of the amended complaint, which the district court granted by order of March 31, 2009. App. 48a. A timely appeal was taken to the United States Court of Appeals for the Third Circuit.

By Opinion of March 22, 2010, the United States Court of Appeals for the Third Circuit affirmed the judgment of the district court, holding that the protections of § 926A did not apply during the delay in Revell's travel because he had possession of his luggage with the firearm in the locked hard case inside (which made the firearm "readily accessible") and suggesting that Revell should have surrendered his firearm to authorities during the travel delay. App.

1a.[2] A timely Petition for Rehearing was denied by the court of appeals on April 20, 2010. App. 71a. On July 8, 2010, Justice Alito granted Revell's motion to extend the time to file this petition until August 18, 2010.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals stands for the proposition that the protections of 18 U.S.C. § 926A evaporate when a traveler becomes stranded with his luggage in a state like New Jersey, through no fault of his own, and has to interrupt his journey with a stay in a hotel. Indeed, more broadly, the decision of the court of appeals effectively destroys the protections of § 926A for any traveler who must move his bags himself within or between interstate transportation facilities in a state like New Jersey, *e.g.*, moving from an airport gate to a ticket counter to check in when changing planes, moving between airports for connecting flights, or moving from a parking garage to a ticket counter. The decision effectively renders § 926A largely meaningless, and subjects victims of transportation mishaps, and those who must temporarily have custody of their luggage (including those traveling by vehicle over more than one day), to arrest and prosecution under local laws with which

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[2] With respect to Count I, the court of appeals affirmed the dismissal and judgment on the pleadings for a different reason than that articulated by the district court, which had held that the claim in Count I could only be brought under the Fourth Amendment, whereas the court of appeals determined that Revell had not complied with § 926A. App. 17a (598 F.3d at 132, n 13).

they cannot comply, and to the seizure of their property, despite the fact that this kind of circumstance is what § 926A was intended to address.

The holding of the court of appeals necessarily relies upon the conclusion that a firearm in a locked hard case inside a piece of luggage is "readily accessible" if the luggage is in the custody of the traveler. To make this leap, the court of appeals effectively deleted the word "readily" from the statute. Under the decision, Congress need not have used the word "readily" in FOPA since "readily accessible" means no more than "accessible" in the court of appeals' view.

To give substance and effect to Congress' mandate to protect the Second Amendment rights of interstate travelers, to preclude further injustice, and to resolve an important question of federal law -- the extent to which Congress has granted protection to interstate travelers with firearms -- that has not been, but should be, settled by this Court, this Court should grant a writ.

Further, with respect to the application of the Fourteenth Amendment's Due Process Clause, the opinion of the court of appeals conflicts with a decision of a state court of last resort and has decided an important question of federal constitutional law -- whether notice and opportunity for a hearing must be afforded where seized property is retained after criminal charges are dismissed -- that has not been, but should be, settled by this Court and has decided that question in a way that conflicts with relevant decisions of this Court.

I.
THE COURT OF APPEALS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW, INCLUDING EFFECTIVELY REPEALING A PROVISION OF AN ACT OF CONGRESS

A. Revell's Firearm Was Not "Readily Accessible" Within The Meaning Of 18 U.S.C. § 926A

In an exercise of its authority under the Supremacy Clause[3] and the Commerce Clause,[4] as well as its authority under the Enforcement Clause of the Fourteenth Amendment,[5] Congress enacted 18 U.S.C. § 926A as a means of affording interstate travelers protection from state and local laws which had the effect of barring travel with firearms through states (such as New Jersey) which prohibit the possession of firearms without a state license/permit. § 926A was part of the Firearms Owners Protection Act of 1986, Pub.L. 99-308, 100 Stat. 449 (1986), in which Congress found, *inter alia*, that:

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[3] U.S. Const. Art VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Laws of any State to the Contrary notwithstanding.")

[4] U S. Const Art. I, Sec. 8 ("The Congress shall have Power . . To regulate Commerce . among the several States")

[5] U.S Const , Fourteenth Amendment, Sec 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.")

> the rights of citizens -- (A) to keep and bear arms under the second amendment to the United states Constitution . . . require additional legislation to correct existing firearms statutes and enforcement policies . . . .

Section 1(b), Pub.L. 99-308.

When exercising its authority under the Supremacy Clause, Congress displaces state regulation, thereby:

> simply leav[ing] the private party free to do anything it chooses consistent with the prevailing federal law. . . . On the subject covered, state law just drops out.

Nixon v. Missouri Municipal League, 541 U.S. 125, 133 (2004).

The court of appeals decision is not faithful to this principle because it undermines federal law, applying the "readily accessible" exception to § 926A where the facts before the court did not justify application of the exception, and in a way that renders § 926A largely meaningless (subjecting any traveler reunited with luggage containing a lawfully checked firearm and ammunition in locked hard cases during the course of travel to arrest and prosecution under state law).

The Enforcement Clause (Section 5) of the Fourteenth Amendment:

> grants Congress the power "to enforce" the substantive guarantees of § 1 . . . by enacting "appropriate legislation." Congress may, in the exercise of its § 5 power, do more than simply proscribe conduct that we have held unconstitutional. Congress' power "to enforce" the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.

Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721, 727 (2003)(internal quotation marks omitted).

McDonald, et al. v. *City of Chicago, Illinois, et al.*, No. 08-1521 (June 28, 2010), held that the right to keep and bear arms is a fundamental, individual right and applied to the states through § 1 of the Fourteenth Amendment. Accordingly, Congress has the power to deter violation of the right to keep and bear arms by the states through the enactment of legislation. Congress exercised this power when it enacted § 926A. Yet the court of appeals has effectively rendered that exercise of power a nullity by applying the "readily accessible" exception in § 926A where the facts before the court clearly did not justify application of the exception.

The gravamen of the decision of the court of appeals is the following:

> Looking solely at the allegations of Revell's original complaint, it is also clear that what happened here does not fall within § 926A's scope because his firearm and ammunition were readily accessible to him during his overnight stay in New Jersey.

App. 16a (598 F.3d at 136).

In particular, the court of appeals stated:

> The complaint reveals that Revell's luggage containing the firearm was, in fact, available to him while he was at the hotel. He alleged that, "[a]fter retrieving his bag, because there were no more connections to Allentown until 9:45 a.m. the following morning ..., *[he] went directly to, and stayed the night at, the Airport Sheraton Hotel.*" (App. at 23.) He further alleged that he returned with his luggage directly to the airport the next day and that a TSA agent, after x-raying the luggage, opened it with a key that Revell gave him.

App. 17a (598 F.3d at 136) (Emphasis added).

The court of appeals then summarily concluded:

> Taking those facts as true, it is clear that the gun and ammunition were readily accessible to Revell during his stay in

> New Jersey and, thus, by the allegations of his own complaint, he was not within the scope of § 926A.

Id.

On a motion to dismiss under Fed. Rule Civ. Pro. 12(b)(6), and for judgment on the pleadings under Fed. Rule Civ. Pro. 12(c), the court must "accept as true all of the factual allegations contained in the complaint." *Swierkiewicz* v. *Sorema N. A.*, 534 U.S. 506, 508, n.1 (2002). Further, "the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974).

The court of appeals' conclusion that Revell's firearm was "readily accessible" to him during his overnight stay is not supported either by the express allegations of the complaint or by a construction of those allegations which is favorable to the pleader.

A firearm is "readily accessible" when it may be easily and quickly reached for immediate use. For example, in *Thornton v. United States,* 541 U.S. 615, 622 (2004), a firearm was "readily accessible" where the "petitioner could have reached under the driver's seat for his gun . . . ." 541 U.S. at 622. The Utah Supreme Court has explained that a firearm is readily accessible where it was "easily within [defendant's] reach in a satchel sufficiently open to permit defendant quickly to reach inside and withdraw the gun for immediate use." *State* v. *Williams*, 636 P.2d 1092, 1095 (Utah 1981). See also Florida Statutes §

790.001(16)("readily accessible for immediate use" "means that a firearm or other weapon is carried on the person or within such close proximity and in such a manner that it can be retrieved and used as easily and quickly as if carried on the person.").

The only allegation concerning Revell's stay at the hotel was that Revell "stayed the night at, the Airport Sheraton Hotel." This allegation says nothing whatever concerning the location of the firearm, or what, if anything, Revell did with the firearm while he was in the hotel. Thus, the court of appeals conclusion must have been derived from a construction of this allegation, or inferences based upon this allegation.

But the court of appeals' conclusion construes the complaint in the light *least* favorable to Revell, which is directly contrary to the requirements of Fed. Rule Civ. Pro. 12(b)(6) and 12(c). Faithful application of Rule 12(b)(6) and Rule 12(c) yields the conclusion that, for purposes of deciding the Rule 12(b)(6) and Rule 12(c) motions, the firearm and ammunition were not "readily accessible."[6] This is particularly true because the original complaint also alleged that the firearm and ammunition were in locked containers inside Revell's luggage and, therefore, Revell could not have quickly reached into the luggage and withdrawn them for immediate use.

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[6] Revell would note that, in his amended complaint (as the court of appeals recognized, App. 18a (598 F.3d at 136, n.14), he alleged that he "did not open either of the locked hard case containers while he was in New Jersey."

Indeed, in concluding that "it is clear that the gun and ammunition were readily accessible to Revell during his stay in New Jersey and, thus, by the allegations of his own complaint, he was not within the scope of § 926A" (App. 17a (598 F.3d at 136)), the court of appeals has simply speculated, based solely on the allegation that Revell "stayed the night at, the Airport Sheraton Hotel," that the firearm and ammunition were "readily accessible" and has not construed the allegations of the complaint favorably to the pleader.

The conclusion that "Revell's luggage containing the firearm was, in fact, available to him while he was at the hotel" cannot support the much stronger conclusion that Revell's firearm was "readily accessible." If mere availability of, or possession or custody of, luggage containing a firearm in a locked case automatically translates to "readily accessible," then any traveler reunited with his luggage during the course of travel (whether changing terminals, airports, or a driver stopping for the night during multi-day vehicular travel) would lose the protections of FOPA and become subject to arrest and prosecution under local laws, because such a traveler's luggage is similarly "available" to him or in his possession.

The court of appeals has effectively grafted a "non-stop transportation only" rule onto FOPA. Under the court of appeals' decision, FOPA is not available for any traveler to whom luggage containing a firearm in a locked hard case becomes available during the course of travel.

To give effect to Congress' decision to enforce the guarantees of the Second Amendment, courts cannot be permitted to deny the protection of § 926A based on mere speculation that a firearm was "readily accessible" simply because the owner was compelled to "stay[] the night" in a hotel through no fault of his own. This important question of federal law should be settled by this Court.[7]

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[7] Having rendered void Congress' protection for an interstate traveler, the court of appeals legislated its own solution "going to law enforcement representatives" and "requesting that his firearm and ammunition be held for him overnight" (App. 21a (598 F 3d at 137-138)), even though this might constitute a waiver of Fifth Amendment rights, and law enforcement would be forbidden under state law from returning the firearm and ammunition. See N.J. Stat. Ann. § 2C:39-12 and N.J Stat. Ann. § 2C.58-3. According to the court of appeals, this would have been "a reasonable means for a responsible gun owner to maintain the protection of Section 926 . . . ." *Id.* The court of appeals notes, however, that its suggestion

> leaves unanswered the question of what the gun owner should do if the law enforcement officers decline to assist him. It may be hoped, however, that officers will not compound a blameless owner's problems in that way.

App. 21a (598 F.3d at 138, n.18).

A better solution would be to enforce the choice made by Congress.

B.
A Split In The Circuits Being Highly Unlikely, The Court Should Grant The Writ To Prevent The Creation Of An Enclave That Is Hostile To The Exercise Of Second Amendment Rights

Although there is no split in the circuits, as a practical matter, a split on this issue is highly unlikely ever to occur, because there are very few jurisdictions like New Jersey where the laws are such that FOPA is significant (so litigation that could result in a split is improbable outside those jurisdictions). And, in the few jurisdictions like New Jersey where FOPA is significant, court decisions have been hostile toward it. See *Torraco, et al.* v. *Port Authority of New York and New Jersey*, *Weasner* v. *Passalaqua, et al.*, 2010 WL 2595312 (2nd Cir. 2010). This promises deeper entrenchment on the issue, and further suggests that an eventual circuit split is highly unlikely. Allowing the court of appeals' decision to stand permits the creation of an isolated enclave where FOPA's key protections have been summarily erased and persons traveling with firearms are imperiled by an inconsistent patchwork of laws, with no recourse.

The decision of the court of appeals directly impacts the right to travel with firearms -- something Congress explicitly sought to protect, and something which implicates the free exercise of fundamental Second Amendment rights. Firearm owners risk a felony conviction merely for traveling through the states which encompass the Third Circuit, which is the very result Congress thought it eliminated by enacting FOPA. If the writ is not granted, this result will very likely become permanent.

II.
THE RETENTION OF REVELL'S PROPERTY WITHOUT NOTICE AND OPPORTUNITY FOR A HEARING VIOLATED THE DUE PROCESS CLAUSE

During the course of Revell's arrest by Officer Erickson, the firearm, holster, locks, hard case containers, and ammunition were seized by the Port Authority Police pursuant to established policy of the Port Authority. After the charges against Revell were dismissed on motion of the prosecution (on August 2, 2005), the Port Authority did nothing with respect to the seized property; it was not returned and no forfeiture proceeding was initiated. It was not until Revell filed this action (on January 27, 2006) seeking, *inter alia*, an order enjoining the Port Authority to return the property that it was returned (on July 24, 2008), two and a half years after this action was filed and almost three years after the charges against Revell were dismissed.

The Fourteenth Amendment provides in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const., Fourteenth Amendment, § 1. In rejecting Revell's due process claim, the court of appeals concluded that the rationale of *Parratt* v. *Taylor*, 451 U.S. 527 (1981)(when a state officer randomly and without authorization departs from established state procedures, the state need only provide post-deprivation procedures) and *Hudson v. Palmer*, 468 U.S. 517 (1984)(unauthorized intentional deprivation of property by state employee does not constitute violation of procedural requirements of the

Due Process Clause if meaningful postdeprivation remedy for loss is available) applied to the retention of Revell's property because Revell:

> identified no policy requiring officers of the Port Authority to retain property that is no longer needed for a prosecution, and it is highly unlikely that such a policy exists.

App. 23a (598 F.3d at 138-139).

In fact, the First Amended Complaint alleged to the contrary, *i.e.*, that "Defendants Port Authority of New York and New Jersey and Scott Erickson deprived Revell of property without due process of law *pursuant to the established policy of Defendant Port Authority of New York and New Jersey.*" Accordingly, there is no basis for the court of appeals' statement that Revell "identified no policy" and there is certainly no basis for the court of appeals' unfounded speculation that "it is highly unlikely that such a policy exists." On the contrary, as summary judgment requires that "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)), the court of appeals should have accepted Revell's allegation as true and concluded that the rationale of *Parratt* and *Hudson* did not apply. Because the rationale of *Parratt* and *Hudson* did not apply, it is immaterial that the "the state's post-deprivation procedures, including state tort remedies, are adequate." App. 23a (598 F.3d at 139).

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), this Court said of the right to a constitutionally mandated hearing:

> This right to be heard has little reality or worth unless one is informed that the matter is pending and *can choose for himself whether to appear or default, acquiesce or contest*. . . . An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and *afford them an opportunity to present their objections*.

339 U.S. at 314 (emphasis added).

In emphasizing that the required notice allows the property owner to "choose" whether to "appear" and "contest" the allegations made by the state in its notice, *Mullane* plainly understood that it is the duty of the state, once it seizes property pursuant to state policy (which is the case here), to provide adequate notice of the process it intends to follow to prove the validity of the deprivation of the property and to provide an opportunity for a hearing at which the state bears the burden of proving its allegations concerning the seizure and at which the property owner may contest the basis for the deprivation of his property. Under *Mullane*, therefore, there is no obligation on the

part of the person deprived of property by the state to seek out a forum for a hearing.

Accordingly, because the criminal charge was dismissed on August 2, 2005, Revell should not have been deprived of the property after August 2, 2005 without being provided constitutionally adequate notice and an opportunity for a post-deprivation hearing. Revell was provided neither. The Port Authority and Officer Erickson thus deprived Revell of his property in violation of the Fourteenth Amendment.

In evaluating a due process claim brought pursuant to § 1983, this Court has explained:

> The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate.

Zinermon v. Burch, 494 U.S. 113, 126 (1990).

In the case at bar, there can be no doubt that a constitutional violation has occurred because Revell was deprived of his property for almost three years after the charges against him were dismissed. There can also be no doubt that the State provided no process whatever, let alone constitutionally adequate process.

Thus, there is a constitutional violation actionable under § 1983.

In addition to being inconsistent with this Court's decisions, the court of appeals decision conflicts with a decision of the Court of Appeals for the District of Columbia, *Ford* v. *Turner*, 531 A.2d 233 (D.C. 1987).

In *Ford*, in response to the plaintiff's contention that she had been deprived of her property without due process, the police chief argued that "§§ 22-3217(d) provides Ford with a constitutionally adequate means of challenging the police seizure and/or retention of the guns without need for a separate notice." 531 A.2d at 236.[8] The court rejected that argument, holding that § 22-3217 "is not even arguably constructive notice of the government's position and of Ford's rights . . . ." 531 A.2d at 237. Further, the court held:

> This failure to give Ford notice "reasonably calculated" to inform her of the reasons why the Property Clerk held the guns and of the means by which Ford could challenge appellees' continued custody of them violated due process. *Memphis Light, Gas & Water Division,* 436 U.S. [1] at 14, 98 S.Ct. [1554] at 1563 [(1978)]("The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit

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[8] D.C Code § 22-3217 is now § 22-4517

> adequate preparation for, an impending `hearing.") (footnote omitted). *At a minimum, she was entitled to notice that certain property had been seized, that the District sought to retain the property pursuant to specified authority, and that a claimant could take particular steps to challenge the District's action.*

531 A.2d at 237-38 (emphasis added).

In the instant matter, no notice that the Port Authority sought to retain the property pursuant to specified authority and that Revell could take particular steps to challenge the Port Authority's action was ever given to Revell. Accordingly, the Port Authority violated Revell's right not to be deprived of his property without due process.

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

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August, 2010

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-2029

GREGG C. REVELL;
ASSOCIATION OF NEW JERSEY RIFLE &
PISTOL
CLUBS INC.

v.

PORT AUTHORITY OF NEW YORK AND NEW
JERSEY; SCOTT ERICKSON

v.

PORT AUTHORITY OF NEW YORK AND NEW
JERSEY,

Third Party Plaintiff

v.

CONTINENTAL AIRLINES; COUNTY OF ESSEX;
ESSEX COUNTY JAIL; ESSEX COUNTY
PROSECUTOR; JOHN DOES 1-10,

Third Party Defendants

Gregg C. Revell,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 06-cv-402)
District Judge: Honorable Katherine S. Hayden

Argued
January 26, 2010

Before: RENDELL and JORDAN, *Circuit Judges*, and PADOVA*, *District Court Senior Judge*

(Filed: March 22, 2010)

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OPINION OF THE COURT

JORDAN, Circuit Judge.

Gregg C. Revell appeals from the dismissal of his claims, brought pursuant to 42 U.S.C. § 1983, seeking to impose liability upon the Port Authority of New York and New Jersey ("Port Authority") and Port Authority Police Officer Scott Erickson for arresting him under New Jersey's gun laws and seizing his firearm and ammunition. According to Revell, his arrest was unlawful because he was in compliance with a provision of the Firearm Owners' Protection Act ("FOPA"), 18 U.S.C. § 926A, which allows gun owners licensed in one state to carry firearms through another state under certain circumstances. Because we conclude that, at the time of his arrest, Revell's conduct did not bring him within the protection of that statute, we will affirm both the dismissal of his § 926A-based claim and the grant of summary judgment to the Port Authority and Erickson on Revell's closely related Fourth Amendment claim. We will likewise

affirm the grant of summary judgment against Revell on his due process claim under the Fourteenth Amendment.

I. Background

A. Revell's Arrest

On March 31, 2005, Revell, a resident of Utah, embarked on a flight from Salt Lake City to Allentown, Pennsylvania, via Minneapolis/St. Paul and Newark, New Jersey. When he arrived at the Northwest Airlines counter[1] in the Salt Lake City Airport, he checked his luggage through to his final destination and declared that, in the luggage, he was carrying an unloaded firearm contained in a locked hard case and ammunition in a separate locked hard case. He signed an orange firearm declaration tag, which was placed inside the locked hard case containing the firearm. That was apparently the last thing on the trip that went as expected. The several mishaps that followed ultimately relate to the accessibility of the firearm and ammunition and are thus key to this dispute.

Because his flight into Newark was late, Revell missed his connection from Newark to Allentown. He booked the next flight to Allentown, which was scheduled to leave Newark at 8 p.m. that evening, but, after the airline changed arrangements, the passengers scheduled for that flight were asked to

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[1] While the record is not entirely clear, it appears that Northwest and Continental Airlines had some shared responsibility for transporting Revell to Allentown

board a bus, instead of a plane, headed for Allentown. Revell got on the bus; however, when he learned that his luggage was not on board, he got off to locate it.[2] By the time he retrieved his luggage, he had missed the bus, and no other connections to Allentown were available. He then went directly to the Newark Airport Sheraton Hotel in a hotel shuttle, taking his luggage with him. The driver of the shuttle van placed Revell's luggage, which contained the locked hard case containers, in the rear storage area of the van, which was not immediately accessible from the passenger compartment where Revell was seated. Revell stayed at the hotel overnight but did not open either of the locked containers during his stay.

The next morning, he took the hotel's airport shuttle back to the Newark Airport and, again, his luggage was placed out of his reach in the rear of the shuttle. Upon arriving at the airport around 8:30 a.m., he proceeded to the ticket counter to check his luggage and declared that he was carrying an unloaded firearm in a locked hard case and ammunition in a separate locked hard case. Revell was told to take his luggage to the Transportation Security Administration ("TSA") area so that it could be x-rayed. After the luggage went through the x-ray machine, the TSA agent at the other end of the machine took the hard cases out and asked Revell for the key to them, which Revell provided. The TSA agent opened the cases using Revell's key and

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[2] In a triple-whammy for Revell, not only had the airline made him miss his connection and then put him on a bus instead of a plane, a Northwest employee had mistakenly checked his luggage to Newark, instead of Allentown, as his final destination

removed the firearm and ammunition. The orange declaration sheet from Salt Lake City was still in the case with the firearm.

About twenty minutes later, several Port Authority officers, including Officer Erickson, escorted Revell to an area away from other passengers where they questioned him about the firearm and ammunition. Revell explained that he had declared his weapon and ammunition, and that he was merely passing through New Jersey en route to Allentown, Pennsylvania. He also showed the officers his Utah concealed firearm permit and his driver's license. When Erickson questioned Revell about why he had the firearm, Revell explained that he was traveling to Pennsylvania to pick up a car to bring back to Utah and that "he was going to need the weapon for protection" as he drove the car home. (App. at 33.) Revell also informed Erickson that, upon missing his flight the day before, he had taken possession of his bag with the firearm in it and had gone to a hotel in Newark to stay for the night. Erickson asked Revell whether he had authority to carry the firearm in Pennsylvania, but Revell did not respond.[3]

Erickson arrested Revell for possession of a handgun without a permit in violation of N.J. Stat. Ann. § 2C:39-5(b) and for possession of hollow-point

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[3] At his deposition, Revell stated that he did not check to make sure that he could carry his firearm in Pennsylvania prior to traveling there, but believed that it was legal for him to carry a weapon there because the instructor for his concealed firearm permit class did not mention that he could not do so.

ammunition in violation of N.J. Stat. Ann. § 2C:39-3(f).[4] Revell was handcuffed, held overnight at the Port Authority jail, and then transferred to the Essex County, New Jersey, Jail, where he was incarcerated for three days until he was released on bond. Four months later, on August 2, 2005, the Essex County prosecutor administratively dismissed all of the charges against him. However, Revell's firearm, ammunition, holster, locks, and hard cases, which were seized at the time of his arrest, were not returned until July 24, 2008, more than two years after the ill-fated trip and approximately a year after he filed his amended complaint in this action.

B. Revell's Complaint

Understandably troubled about his and his property's treatment, Revell brought the present § 1983 case, alleging that the Port Authority and Erickson had violated his rights under § 926A of FOPA.[5] In essence, § 926A allows a person to

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[4] Section 2C:39-5(b) provides that "[a]ny person who knowingly has in his possession any handgun, .. without first having obtained a permit to carry the same as provided in N.J.S 2C.58-4, is guilty of a crime" of the second or third degree depending on the nature of the handgun. Section 2C:39-3(f) provides that "[a]ny person, who knowingly has in his possession any hollow nose or dum-dum bullet, . is guilty of a crime of the fourth degree ."

[5] Additionally, the Association of New Jersey Rifle & Pistol Clubs, Inc. brought a § 1983 claim based on 18 U.S.C. § 926A, seeking to enjoin the Port Authority from enforcing against the Association's non-resident members the New Jersey statutes under which Revell was arrested. The District Court found that

transport a firearm and ammunition from one state through a second state to a third state, without regard to the second state's gun laws, provided that the traveler is licensed to carry a firearm in both the state of origin and the state of destination and that the firearm is not readily accessible during the transportation.[6] 18 U.S.C. § 926A. Revell also alleged that the appellees violated his Fourteenth Amendment rights by retaining his firearm, holster, locks, containers and ammunition, thereby depriving him of his property without due process. He sought damages and an injunction requiring the Port Authority to return his property.

C. The District Court's Dismissal of Revell's Complaint

Erickson moved to dismiss Revell's claims and the Port Authority moved for judgment on the pleadings.[7] They argued, among other things, that probable cause existed for the arrest because § 926A

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the Association lacked standing and dismissed its claim. The Association appealed that ruling to our Court and we reversed, holding that the Association did, in fact, have standing to pursue its claim on behalf of its members. *Revell* v. *Port Auth. of N.Y. & N.J.*, 321 F App'x 113, 117 (3d Cir.2009). The Association's lawsuit is not at issue in this appeal.

[6] The text of § 926A is set forth in section III A, *infra*.

[7] Since the Port Authority had already answered Revell's complaint, it moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), while Erickson, who had not answered the complaint, moved to dismiss for failure to state a claim under Rule 12(b)(6).

was inapplicable, given Revell's overnight stay in New Jersey. They also argued that Erickson was entitled to qualified immunity.

The District Court noted that its first task was to "determine whether 18 U.S.C. § 926A created an enforceable personal right," an issue of first impression. (App. at 44.) The Court answered that question by holding that, pursuant to the Supreme Court's decision in *Graham* v. *Connor*, 490 U.S. 386 (1989), Revell was required to frame his § 1983 claim in terms of the Fourth Amendment, as opposed to § 926A, because he sought damages for an allegedly improper arrest. In other words, the Court concluded that, "[b]ecause individuals already have a method of recovering damages pursuant to § 1983 if they are arrested or charged without probable cause, [i.e., a claim under the Fourth Amendment,] it is unnecessary and, indeed, improper ... to conclude that § 1983 provides a separate or alternative remedy for a violation of § 926A." (App. at 49.) The Court thus dismissed Revell's § 1983 claim for the alleged violation of § 926A, but it granted him leave to file an amended complaint stating a Fourth Amendment claim.

The Court also dismissed Revell's procedural due process claims for damages and injunctive relief.[8] The Court, relying on *Parratt* v. *Taylor*, 451 U.S. 527

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[8] The District Court analyzed Revell's due process claims to determine whether he had also pled a substantive due process violation and concluded that he had not. That issue is not on appeal

(1981), explained that, if constitutionally adequate state procedures were available to remedy the deprivation of Revell's property, he could not succeed on his due process claim. Since Revell neither availed himself of state law remedies nor explained why those remedies would be futile or constitutionally inadequate, the Court dismissed that claim. However, it granted Revell leave to amend his complaint to allege that "the Port Authority's postdeprivation remedies for the return of seized property are constitutionally inadequate." (App. at 53.)

On June 29, 2007, the District Court entered an order dismissing Revell's complaint and allowing him leave to amend pursuant to the memorandum opinion.

D. Revell's Amended Complaint

Not long after, on July 13, 2007, Revell filed an amended complaint against the Port Authority and Erickson. In the first count, he asserted that his arrest and the seizure of his property violated his Fourth Amendment rights because, pursuant to § 926A, he was legally entitled to carry the firearm and ammunition in his luggage, notwithstanding New Jersey law. Revell also asserted two procedural due process claims-one for damages and one for injunctive relief requiring the return of his property-based on allegations that the Port Authority "has no post-deprivation procedure for Revell to recover the [property] seized from him" and that the defendants "did not provide him notice of the basis for the retention of the property and of an opportunity for a post-deprivation hearing." (App. at 64.) He later

voluntarily dismissed his due process claim for injunctive relief, after his property was returned to him.

E. The District Court Grants Summary Judgment on Revell's Claims

Following discovery, the Port Authority and Erickson moved for summary judgment, arguing that probable cause supported Revell's arrest and that Erickson is protected by qualified immunity. They asserted that § 926A did not immunize Revell from arrest for violating New Jersey's gun laws because, contrary to an express requirement of § 926A, Revell's weapon was readily accessible to him during his stay in New Jersey. They also moved for summary judgment on Revell's due process claim, arguing that New Jersey has in place adequate post-deprivation procedures for those who seek the return of property seized upon arrest, including state tort remedies, and that Revell failed to avail himself of any of those procedures.

The District Court held that the Port Authority and Erickson were entitled to summary judgment on the Fourth Amendment claim, "because probable cause [for the arrest and property seizure] developed during ... [Erickson's] questioning concerning Revell's transportation of a handgun and ammunition through New Jersey." (App. at 78.) The Court found persuasive the defense argument that Revell's conduct fell outside § 926A since it is undisputed that Revell left the airport with his luggage for an overnight stay at a hotel in New Jersey, thus giving him ready access to

the gun during that period. The Court also explained that " § 926A does not address anything but vehicular travel; it does not encompass keeping the weapon-locked in a case or not-in an airport hotel overnight." (App. at 77.) Alternatively, the Court held that Erickson was entitled to qualified immunity because probable cause existed for Revell's arrest and, therefore, no constitutional right was violated. The District Court also concluded that summary judgment against Revell on his due process claim was proper because he had failed to take advantage of available state remedies for the return of his property, namely, a state court lawsuit.[9]

In a March 31, 2009 order, the District Court granted the summary judgment motion in accordance with its memorandum opinion. Revell timely appealed both the summary judgment order and the order dismissing his original complaint.

II. Standard of Review[10]

Our review of the District Court's decision to grant the Port Authority's motion for judgment on the pleadings and Erickson's motion to dismiss is plenary. See *E.I. DuPont de Nemours & Co.* v. *United States*, 508 F.3d 126, 131 (3d Cir.2007); *DeHart* v. *Horn*, 390

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[9] The Court noted that Revell's property was apparently returned to him after he made "a simple request to Essex County." (App. at 81.)

[10] The District Court had jurisdiction over Revell's claims pursuant to 28 U.S C. §§ 1331 and 1343. Our jurisdiction is based upon 28 U.S.C § 1291.

F.3d 262, 272 (3d Cir.2004). A court confronted with a Rule 12(b)(6) motion must accept the truth of all factual allegations in the complaint and must draw all reasonable inferences in favor of the non-movant. *Gross* v. *German Found. Indus. Initiative*, 549 F.3d 605, 610 (3d Cir.2008). A motion for judgment on the pleadings based on the defense that the plaintiff has failed to state a claim is analyzed under the same standards that apply to a Rule 12(b)(6) motion. *Turbe* v. *Gov't of the V.I.*, 938 F.2d 427, 428 (3d Cir.1991).

We also exercise plenary review over an appeal from a grant of summary judgment. *Jacobs Constructors, Inc.* v. *NPS Energy Servs., Inc.*, 264 F.3d 365, 369 (3d Cir.2001). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id. (citing FED.R.CIV.P. 56(c)). "In making this determination, we must consider the evidence in the record in the light most favorable to the nonmoving party." *Id.*

III. Discussion

"To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West* v. *Atkins*, 487 U.S. 42 , 48 (1988). There is no question that the defendants in Revell's suit were acting under color of state law when effecting his arrest. The issue is whether Revell has alleged a violation of any right under federal law. Revell's § 1983 claims seek to

remedy perceived violations of his alleged statutory right under § 926A, his Fourth Amendment rights, and his Fourteenth Amendment due process rights.[11] We will first address the § 926A claim and the Fourth Amendment claim, before turning to the due process claim.

A. Section 926A and the Fourth Amendment

Revell challenges both the District Court's dismissal of his § 926A claim and the Court's grant of summary judgment on his Fourth Amendment claim. He asserts that he never should have been required to re-frame his § 926A claim in terms of the Fourth Amendment, since, as he sees it, § 926A provides a federal right that may be remedied by way of § 1983, independent of the Fourth Amendment. As to his Fourth Amendment claim, Revell asserts that the District Court erred in concluding that probable cause existed for his arrest. More specifically, and returning to the same § 926A theme, he says that the District Court incorrectly determined that he did not fall within the protection provided by that statute. Revell does not dispute that his conduct violated New Jersey law but instead claims that he was not subject to arrest because he complied with § 926A and that § 926A preempts New Jersey's gun laws under the

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[11] For ease of reference, we will refer to those § 1983 claims as Revell's § 926A claim, his Fourth Amendment claim, and his due process claim.

circumstances presented here.[12] He also challenges the District Court's conclusion that Erickson was entitled to qualified immunity against the Fourth Amendment claim.

In order for Revell to prevail either on the theory that he had a right under § 926A that can be remedied through § 1983 or on the theory that the Fourth Amendment should have protected him from arrest because § 926A gave him a right to transport his gun, he must first establish that he complied with the conditions set forth in § 926A so as to be entitled to its protection. Accordingly, we begin our analysis with the question of whether Revell was in compliance with § 926A when he was arrested in New Jersey.

Section 926A of FOPA, entitled "Interstate transportation of firearms," provides:

> Notwithstanding any other provision of any law or any rule or regulation of a State or any political subdivision thereof, any person who is not otherwise

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[12] Section 927 of Title 18, captioned "Effect on State law," provides:

> No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.

> prohibited by this chapter from transporting, shipping, or receiving a firearm shall be entitled to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle: Provided, That in the case of a vehicle without a compartment separate from the driver's compartment the firearm or ammunition shall be contained in a locked container other than the glove compartment or console.

18 U.S.C. § 926A. It is clear from the statute that a person transporting a firearm across state lines must ensure that the firearm and any ammunition being transported is not "readily accessible or ... directly accessible from the passenger compartment of [the] transporting vehicle." *Id.* Looking solely at the allegations of Revell's original complaint, it is also clear that what happened here does not fall within § 926A's scope because his firearm and ammunition were readily accessible to him during his overnight stay in New Jersey.

Revell attempts to invoke the protection of the

statute by alleging that "[d]uring the transportation of the firearm, neither the firearm nor the ammunition were readily accessible or directly accessible from the passenger compartment of the aircraft or the bus [that he took to the hotel]." (App. at 25.) But only the most strained reading of the statute could lead to the conclusion that having the firearm and ammunition inaccessible while in a vehicle means that, during the owner's travels, they can be freely accessible for hours at a time as long as they are not in a vehicle. The complaint reveals that Revell's luggage containing the firearm was, in fact, available to him while he was at the hotel. He alleged that, "[a]fter retrieving his bag, because there were no more connections to Allentown until 9:45 a.m. the following morning ..., [he] went directly to, and stayed the night at, the Airport Sheraton Hotel." (App. at 23.) He further alleged that he returned with his luggage directly to the airport the next day and that a TSA agent, after x-raying the luggage, opened it with a key that Revell gave him. Taking those facts as true, it is clear that the gun and ammunition were readily accessible to Revell during his stay in New Jersey and, thus, by the allegations of his own complaint, he was not within the scope of § 926A. Dismissal of the § 926A claim was therefore proper.[13]

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[13] The District Court dismissed Revell's § 926A claim based upon its conclusion that Revell was required to bring that claim pursuant to the Fourth Amendment. But, we "may affirm a result reached by the district court on reasons that differ so long as the record supports the judgment." *Johnson* v. *Orr*, 776 F 2d 75, 83 n. 7 (3d Cir 1985). Based solely on the allegations of the complaint, it is clear that Revell did not comply with § 926A, so we can affirm the District Court's dismissal on that basis alone.

Turning to the summary judgment motion on Revell's Fourth Amendment claim, the depositions filed in support of that motion serve to confirm the conclusion that Revell had access to his gun and ammunition, contrary to § 926A's requirement.[14] Erickson testified that, under questioning, Revell said he had been forced to stay overnight at a hotel in Newark because he had missed his flight. Erickson also testified that Revell acknowledged he "had the firearm with him when he left for Newark, that he had picked up the bag and taken it with him." (App. at 33.) Specifically, Erickson testified as follows:

> Q: He told you that he picked up the bag at Newark because he missed his flight, and went out of the airport, correct?
>
> A: Yes.
>
> Q: And did he tell you that he went to a hotel that night?
>
> A: Yes.

Given our disposition, we do not address the more difficult question of whether, if he had complied with § 926A, Revell would have been able to pursue a § 1983 claim based upon § 926A

[14] Revell's amended complaint, which contains his Fourth Amendment claim, alleges the same facts as his original complaint, with the addition of one new allegation-that Revell did not open either of the locked hard cases while he was in New Jersey The amended complaint also described in greater detail the inaccessibility of the luggage during the shuttle ride to and from the airport to the hotel.

(*Id.*) Revell's own deposition further confirms that, upon missing his flight to Allentown, he retrieved his luggage, took a shuttle to a nearby hotel, and then returned to the airport the following morning with his bags.

Revell thus had access to his firearm and ammunition during his stay at the New Jersey hotel, whether or not he in fact accessed them and regardless of whether they were accessible while he was traveling by plane or van. That crucial fact takes Revell outside the scope of § 926A's protection, as the District Court correctly noted.[15] (App. at 77 ("[N]othing in the

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[15] With regard to whether probable cause existed for his arrest, Revell attempts to raise factual disputes concerning what Erickson knew at the time he arrested Revell, arguing that Erickson did not know what Revell did with his bag when he went to the hotel and that Erickson did not know whether he stayed overnight. First, Revell mischaracterizes the record, as Revell himself testified that he told the officers that he "had been forced to stay in the hotel." (App. at 37.) Second, even if Erickson were required to consider § 926A's impact in his probable cause analysis, an issue on which we express no holding, Revell told Erickson that he had picked up his luggage from the airport and went to a hotel for the night. A reasonable officer would be entitled to infer from Revell's statements that he had access to his firearm and ammunition while at the New Jersey hotel. Whether Revell in fact accessed them is irrelevant. Given our conclusion that Revell was not protected by § 926A when he was arrested in New Jersey, we need not address the interrelation between § 926A and probable cause. We do, however, note our concern with the implications of Revell's argument that § 926A requires an officer to "investigate the laws of the jurisdiction from which the traveler was traveling and the laws of the jurisdiction to which the traveler was going" prior to making an arrest. (Appellant's Reply Br. at 13.) It seems doubtful that, in passing § 926A, Congress

pleadings or the record indicates that Revell's handgun and ammunition were anything but readily accessible to him during his overnight stay in New Jersey.").) Accordingly, Revell was subject to arrest for violating New Jersey's gun laws.[16] We will therefore affirm the District Court's grant of summary judgment on his Fourth Amendment claim.[17]

Although we conclude that Revell fell outside of § 926A's protection during his stay in New Jersey, we recognize that he had been placed in a difficult predicament through no fault of his own. However, Section 926 clearly requires the traveler to part ways with his weapon and ammunition during travel; it does not address this type of interrupted journey or what the traveler is to do in this situation. Stranded gun

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intended to impose upon police officers such a potentially burdensome requirement. See *Torraco* v. *Port Auth. of N.Y. & N.J.*, 539 F.Supp.2d 632, 644 (E.D.N.Y 2008) ("[I]t is simply too much to read into § 926A a Congressional intent to require local police to have on-the-spot knowledge of the firearms laws of all 50 States.").

[16] To satisfy the Fourth Amendment, a warrantless arrest must be based on probable cause that a crime has been or is being committed. *Devenpeck* v *Alford*, 543 U.S. 146, 152 (2004), see also *United States* v. *Stubbs*, 281 F.3d 109, 122 (3d Cir.2002). There is no question that Erickson observed Revell in possession of a firearm and hollow-point bullets in violation of New Jersey law.

[17] Because we conclude that Revell's weapon and ammunition were readily accessible to him, we need not address Revell's argument that § 926A should be broadly construed to "immunize[ ] non-vehicular transportation if the firearm is not readily accessible." (Appellant's Op. Br. at 32.) Nor do we reach the issue of qualified immunity

owners like Revell have the option of going to law enforcement representatives at an airport or to airport personnel before they retrieve their luggage. The careful owner will do so and explain his situation, requesting that his firearm and ammunition be held for him overnight.[18] While this no doubt adds to the inconvenience imposed upon the unfortunate traveler when his transportation plans go awry, it offers a reasonable means for a responsible gun owner to maintain the protection of Section 926 and prevent unexpected exposure to state and local gun regulations.

B. Due Process

Revell also asserts that the District Court erroneously granted summary judgment on his due process claim. In order to determine whether an individual has been deprived of his property without due process "it is necessary to ask what process the State provided, and whether it was constitutionally adequate." *Zinermon* v. *Burch*, 494 U.S. 113, 126 (1990). "This inquiry ... examine[s] the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law." Id. Although a pre-deprivation hearing is generally required before a state seizes a

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[18] Of course, this suggestion leaves unanswered the question of what the gun owner should do if the law enforcement officers decline to assist him. It may be hoped, however, that officers will not compound a blameless owner's problems in that way.

person's property, "[i]n some circumstances ... the Court has held that a statutory provision for a postdeprivation hearing, or a common-law tort remedy for erroneous deprivation, satisfies due process." Id. at 128.

For example, in *Parratt* v. *Taylor*, and thereafter in *Hudson* v. *Palmer*, the Supreme Court held that, when a state officer randomly and without authorization departs from established state procedures, the state need only provide post-deprivation procedures. *Hudson*, 468 U.S. 517, 533 (1984); *Parratt*, 451 U.S. 527, 543 (1981), *overruled in part on other grounds*, *Daniels* v. *Williams*, 474 U.S. 327 (1986) (overruling *Parratt* to the extent it suggested that a constitutional injury could be established based on negligence). The Supreme Court held in *Parratt* that a state tort claim was an adequate remedy for a prisoner aggrieved by prison officials' negligent loss of his property, and in *Hudson* the Court held the same with respect to a prisoner whose property was intentionally destroyed by a prison guard.

The District Court relied on *Parratt* in deciding that Revell's failure to take advantage of available remedies, namely a state court lawsuit, warranted summary judgment on his due process claim. Revell argues that, because his deprivation was made pursuant to Port Authority policy as opposed to an unauthorized act, a state tort remedy is insufficient and that, instead, "there must be a statutory provision for a post-deprivation hearing to satisfy due process." (Appellant's Op. Br. at 25.) But, Revell's due process

claim is not based on defendants' initial seizure of the property. Instead, in his opening brief, Revell clarified that his claim rests on the defendants' retention of his property after the charges against him had been dismissed and on their failure to provide him notice and an opportunity for a post-deprivation hearing. (Appellant's Op. Br. at 26 ("Revell should not have been deprived of the property after August 2, 2005 without being provided constitutionally adequate notice and an opportunity for a post-deprivation hearing.").) Revell has identified no policy requiring officers of the Port Authority to retain property that is no longer needed for a prosecution, and it is highly unlikely that any such policy exists. Accordingly, the rationale of *Parratt* and *Hudson* does apply. See *Case* v. *Eslinger*, 555 F.3d 1317, 1331 (11th Cir.2009) ("We have recognized that a civil cause of action for wrongful conversion of personal property under state law is a sufficient postdeprivation remedy when it extends to unauthorized seizures of personal property by state officers." (internal quotations omitted)).

Revell cannot prevail on his due process claim if the state's post-deprivation procedures, including state tort remedies, are adequate. He has failed to explain why New Jersey's state procedures to recover wrongfully seized property, such as the ability to move in the criminal action for return of his property or the ability to file a separate action for a writ of replevin, are insufficient. See *State* v. *One* 1986 Subaru, 576 A.2d 859, 318 (N.J.1990) (explaining that owner of seized property can file a replevin action or move to retrieve improperly seized property and "[b]ecause of the availability of [such] procedures ..., a claimant's

inaction may weigh against a claim that his or her due-process rights have been violated"); see also N.J. Rule 3:5-7 (motion for return of property)[19] and 4:61-1 (replevin). Nor has Revell shown any entitlement to special notice of those procedures. See *City of W. Covina* v. *Perkins*, 525 U.S. 234, 236 (1999) (holding that due process clause does not "require [ ] a State or its local entities to give detailed and specific instructions or advice to owners who seek return of property lawfully seized but no longer needed for police investigation or criminal prosecution"). Thus, his due process claim fails and summary judgment was warranted. *Cf. Mora* v. *City of Gaithersburg*, 519 F.3d 216, 230 (4th Cir.2008) (rejecting plaintiff's procedural due process claim, when police retained plaintiff's weapons after seizing them because "[plaintiff] has had, and continues to have, notice and an opportunity to be heard in Maryland, and he cannot plausibly claim that Maryland's procedures are unfair when he has not tried to avail himself of them.").

IV. Conclusion

Section 926A does not apply to Revell because his firearm and ammunition were readily accessible to him during his stay in New Jersey. That conclusion is fatal to his § 926A claim and the associated Fourth

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[19] Although Rule 3 5-7 directly speaks to the ability of a defendant to move for the return of property that was unlawfully seized, which Revell could have done in light of his claim that his arrest and the seizure of his property were unlawful, Revell may well have found a New Jersey court sympathetic to a motion under that Rule for the return of his property once the charges against him were dropped

Amendment claim. We accordingly affirm the District Court's dismissal and grant of summary judgment, respectively, on those claims. We also affirm the District Court's grant of summary judgment on Revell's due process claim because he did not take advantage of state procedures available to him for the return of his property.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GREGG C. REVELL,

Plaintiff,

v.

Civ. Action
No. 06-402 (KSH)

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY and SCOTT ERICKSON,

Defendants and Third-Party Plaintiff

OPINION

v.

CONTINENTAL AIRLINES, THE COUNTY OF ESSEX, THE ESSEX COUNTY JAIL, THE OFFICE OF THE ESSEX COUNTY PROSECUTOR et al.

Third-Party Defendants.

KATHARINE S. HAYDEN, U.S.D.J.

This action arises from the arrest and subsequent detention of plaintiff Gregg C. Revell at Newark Liberty Airport ("Newark Airport") on April 1, 2005. The following motions are before the Court in this matter. Defendants Port Authority of New York and New Jersey ("Port Authority") and Police Officer Scott Erickson ("Erickson") (collectively, "Port Authority defendants") have moved for summary judgment dismissing the complaint against them. (D.E.93.) Third-Party Defendants, the County of Essex and the Essex County Prosecutor's Office (collectively, "Essex County"), have moved to dismiss in lieu of answering the third-party complaint asserted against them by Third-Party Plaintiffs Port Authority and Erickson. (D.E.92.) Third-Party Defendant Continental Airlines ("Continental") has moved for summary judgment of dismissal as to the Port Authority's third-party complaint against it. (D.E. 97, 106.) In this opinion, the Court addresses all pending motions.

I. FACTUAL BACKGROUND

Because the relevant facts were stated in an earlier decision, and are essential to understanding Revell's claims, they are recited here.

> On March 31, 2005, Revell, a resident of Utah, checked in with Northwest Airlines at the Salt Lake City Airport. His destination was Allentown, Pennsylvania, via Minneapolis/St. Paul and Newark, New Jersey. When he

checked in, Revell declared that his bag contained an unloaded firearm in a locked hard case container and ammunition in a separate locked hard case container. Revell signed an orange firearm declaration tag, which was placed inside the container holding the firearm.

Revell's flight to Newark was late and he missed his connecting flight to Allentown. After waiting five hours inside the secure area of the airport, he was directed to board a bus that would drive him and other passengers to Allentown. After taking his seat on the bus, Revell learned from the driver that his checked luggage had not been placed on the bus, so he got off to search for his bag. By the time Revell found it in the lost luggage area of Newark Airport, the bus to Allentown had already left. An airline employee told him that the airline?s computer system showed that although he had checked the bag through to Allentown, the airline had mistakenly tagged his bag with Newark as its final destination. As there were no other connections to Allentown that night, Revell took his bag and stayed overnight at a nearby hotel.

The next morning, Revell went directly to Newark Airport. At the airline

check-in counter, he once again declared that he had a firearm and ammunition in his bag and that they were stored in separate locked hard case containers. Revell signed a white form and was directed to an x-ray area, where he again declared the firearm and ammunition. After his bag went through the x-ray machine, an agent at the end of the machine opened the cases using Revell's key. The orange firearm declaration from Revell's Salt Lake City check-in was still in the firearm container. After approximately 20 minutes, several police officers escorted Revell to a different area of the airport where they questioned hi m about the firearm and ammunition. Revell showed them his Utah concealed firearm permit and driver?s license, and explained that he was simply traveling through New Jersey from Utah and that he was on his way to Pennsylvania.

It is unclear exactly when Officer Scott Erickson appeared on the scene, but he ultimately arrested Revell for possession of a handgun without a permit in violation of N.J.S.A. § 2C:39-5(b) and for possession of hollow point ammunition in violation of N.J.S.A. § 2C:39-3(f). Revell's firearm, ammunition, holster, locks, and hard case containers were seized, and he was charged with unlawful possession of a handgun

> without a permit and unlawful possession of hollow point ammunition. He was handcuffed, placed in a police car, and held overnight in the Port Authority jail. The next day, Revell was transported to the Essex County Jail, where he was detained for three days. Ultimately, some four months later, on August 2, 2005, the Essex County Prosecutor administratively dismissed all charges. As of the date of filing the complaint, the firearm, ammunition, holster, locks, and hard case containers had not been returned.

(Op. dated June 29, 2007 (D.E.38)). On June 29, 2007, the Court granted Port Authority defendants' motion to dismiss Count One of Revell's original complaint, which sought to recover monetary damages and injunctive relief pursuant to 42 U.S.C. § 1983 for a violation of a statutory right secured by 18 U.S.C. § 926A, concluding that § 926A did not create a private right of action. (D.E. 38.) At the same time, the Court permitted Revell to amend his complaint "to state a § 1983 claim for an unreasonable arrest and seizure of property in violation of the Fourth Amendment." (D.E.38.) The Court also dismissed Counts Two and Three, which claimed that defendants, acting under color of State law, had deprived him of his property (firearm, ammunition, holster, locks, and hard case containers), without due process of law as guaranteed by the Fourteenth Amendment and sought redress in the form of monetary relief (Count Two) and injunctive relief (Count Three). (D.E.38.) The Court granted leave

for Revell to reframe these counts as "a claim alleging that the Port Authority's post-deprivation remedies for the return of seized property are constitutionally inadequate." (D.E.38.) The Court also dismissed Count Four, which had been brought by the Association of New Jersey Rifle and Pistol Clubs, Inc. (the "Association"), finding that the Association's claim to enjoin defendants from enforcing N.J.S.A. §§ 2C:39-5(b) (possession of a handgun without a permit) and 2C:39-3(f) (possession of hollow point ammunition) against its non-resident members transporting a firearm and ammunition through New Jersey pursuant to 18 U.S.C. § 926A "d[id] not meet Article III's injury in fact requirement to establish an actual case or controversy." (D.E.38.) On September 7, 2007, the Association filed a notice of appeal of its dismissal as a plaintiff. (D.E.64.)

Revell timely filed an amended complaint, recasting Claims One, Two and Three as permitted by the Court, and the Association dropped Claim Four, as ordered. (D.E.46.) In the amended complaint, Count One asserts a § 1983 claim for damages pursuant under the Fourth Amendment. Count Two pleads a claim for damages, alleging that Port Authority deprived Revell of his property without due process of law. Count Three, which Revell has since voluntarily dismissed,[1] sought injunctive relief for the same alleged due process violations. In the new complaint, Revell supplements paragraph 12 of his original complaint regarding his transportation to the airport

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[1] Revell advised the Court on July 24, 2008 that the Port Authority returned his property. (D.E 101)

Sheraton (corresponds to ¶ 11 in the amended complaint), as follows:

> His bags (including both locked hard case containers) were placed in the rear, baggage area of the van by the driver of the hotel shuttle van. The bags were not readily or directly accessible from the passenger compartment of the hotel shuttle van as there were two seats between him and the bags and he would have had to climb over the rear seat to get to the bags.

(Am.Compl.¶ 11.)

A final pretrial order was entered on September 28, 2007. (D.E.70.) Essex County filed its motion to dismiss in lieu of answering on June 11, 2008, followed by Port Authority defendants' cross-motion for summary judgment on June 13, 2008. Continental thereafter moved on August 8, 2008 for summary judgment as to the third-party complaint.[2]

II. STANDARD OF REVIEW

Port Authority defendants' motion, as well as Continental's motion, are made pursuant to Rule 56(c), Fed.R.Civ.P. Summary judgment may be granted "if

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[2] A third-party action was brought by Port Authority against Essex County and Continental, essentially alleging that Continental's malfeasance was the proximate cause of any injury to Revell. (D.E.55)

the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must "view the facts in the light most favorable to the non-moving party and [must] draw all inferences in that party's favor." *Gray v. York Newspapers*, 957 F.2d 1070, 1080 (3d Cir.1992). Summary judgment is inappropriate if there is evidence sufficient to allow a reasonable jury to return a verdict for the non-moving party, see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), or if the factual dispute is one which might affect the outcome of the suit under the governing law ...." Id. The movant's burden, however, "may be discharged by 'showing' ... that there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Additionally, the non-movant "may not rest upon mere allegations or denials of the ... pleading"; instead, the non-movant, "by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." *Matushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Here, the facts necessary to the determination of the pending motions for summary judgment are not in dispute.

Essex County's motion is made in lieu of an answer, and although Essex County does not set forth a standard in its papers, the grounds it cites for dismissal comport with a motion made pursuant to Rule 12(b)(6), Fed.R.Civ.P. The bases for dismissal advanced by Essex County include that the Port

Authority has no right of contribution on a § 1983 action, that the Eleventh Amendment and absolute immunity bar monetary claims against Essex County Prosecutor?s Office, and that no Eighth Amendment claim is properly pled. None of these arguments require the Court to look further than the pleadings, and, accordingly, the Court will treat Essex County's motion as being made under Rule 12(b)(6).

To survive a motion to dismiss under Rule 12(b)(6), a complaint must allege facts that raise a right to relief above the speculative level. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Although a court must accept as true all allegations in the complaint and view them in the light most favorable to the plaintiff, Phillips v. County of Allegheny, 515 F.3d 224, 231 (3d Cir.2008), the court need not accept sweeping legal conclusions that are framed as factual allegations, unwarranted inferences, or unsupported conclusions. Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir.1997). A plaintiff must allege sufficient facts to show that the legal allegations are not just possible, but also are plausible. Phillips, 515 F.3d at 234. According to the Third Circuit, Rule 12(b)(6) "requires not merely a short and plain statement, but instead mandates a statement showing that the pleader is entitled to relief," meaning "there must be some showing sufficient to justify moving the case beyond the pleadings to the next stage of litigation." Id. at 234-35.

III. ANALYSIS

A. Probable Cause

Port Authority defendants' principal arguments are that Revell's § 1983 claim must be dismissed because there was probable cause for Revell's arrest, and, in any event, that Erickson is protected by qualified immunity because his actions were objectively reasonable.

Port Authority defendants' "motion is based on the probable cause [issue] for the arrest of Mr. Revell in light of the facts and circumstances presented to the arresting police officers who questioned Mr. Revell regarding hi s authority to possess and carry the hand gun in his luggage." (Port Auth. Br. 1.) Revell agrees with the centrality of probable cause, stating "the issue for this motion is whether Defendants had probable cause to arrest Revell." (Revell Br. 6.)

Revell's complaint alleges that he "was entitled to transport a firearm and ammunition through New Jersey, notwithstanding N.J.S. § 2C:39-5(b) and N.J.S. § 2C:39-3(f)" because his travel was protected under 18 U.S.C. § 926A. (Am.Compl.¶¶ 29-30.) Revell alleges that his arrest and the seizure of his property at Newark Airport were unreasonable, thereby violating the Fourth and Fourteenth Amendments to the U.S. Constitution.

The statute upon which Revell relies, 18 U.S.C. § 926A, provides:

> Notwithstanding any other provision of any law or any rule or regulation of a State or any political subdivision thereof, any person who is not otherwise prohibited by this chapter [18 USC §§ 921 et seq.] from transporting, shipping, or receiving a firearm shall be entitled to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle: Provided, That in the case of a vehicle without a compartment separate from the driver's compartment the firearm or ammunition shall be contained in a locked container other than the glove compartment or console.

18 U.S.C. § 926A.

Revell argues that § 926A shielded him from criminal liability under N.J.S. § 2C:39-5(b) for possession of an unlicensed handgun, which provides in pertinent part: "Any person who knowingly has in his possession any handgun ... without first having obtained a permit to carry the same as provided in N.J.S. 2C:58-4, is guilty of a crime[.]" Revell likewise

argues that § 926A insulates his possession of hollow nose ammunition from prosecution under N.J.S. § 2C:39-3(f), which provides: "Any person, other than a law enforcement officer or persons engaged in activities pursuant to subsection f. of N.J.S. 2C:39-6, who knowingly has in his possession any hollow nose or dum-dum bullet ... is guilty of a crime[.]" As the parties have correctly posited, *see supra*, the Court must determine whether Officer Erickson had probable cause to arrest Revell based upon the information known to Erickson during their encounter at Newark Airport.[3]

"Probable cause exists where the facts and circumstances within the arresting officer?s knowledge are sufficient to warrant a reasonable person to believe an offense had been committed [by the suspect in question]." *United States v. Goode*, 2009 U.S.App. LEXIS 2471, *8 (3d Cir. Feb. 9, 2009) (quoting *United States v. McGlory*, 968 F.2d 309, 342 (3d Cir.1992)). "[P]robable cause is a fluid concept-turning on the assessment of probabilities in particular factual

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[3] Given the nature of the police encounter-in which Revell was passing through a security checkpoint in an airport-Revell cannot contend that Erickson should not have stopped him or that Erickson's questioning of him offends the Fourth Amendment. See *Terry v. Ohio*, 392 U.S. 1, 19 n. 16 (1968) (noting that police officers may investigate without offending the Fourth Amendment), see also *United States v. Hartwell*, 436 F.3d 174, 179 (3d Cir.2006) (quoting *Singleton v. Comm'r*, 606 F.2d 50, 52 (3d Cir 1979) ("The government unquestionably has the most compelling reasons[-]the safety of hundreds of lives and millions of dollars worth of private property[-]for subjecting airline passengers to a search for weapons or explosives that could be used to hijack an airplane.").

contexts-not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. 213, 232 (1983). Probable cause is a "common-sense standard" wherein the belief of a "man of reasonable caution ... does not demand any showing that such a belief be correct or more likely true than false." *Texas v. Brown*, 460 U.S. 730, 742 (1983). As is the case here, where "facts are not in dispute, the presence or absence of 'probable cause' has long been acknowledged to be a question of law." *Wyatt v. Cole*, 504 U.S. 158, 178 (1992).

Port Authority defendants contend that, with regard to the facts known by Erickson, probable cause existed for Revell's arrest for illegally possessing a .45 caliber handgun and hollow-nose bullets in violation of New Jersey law. Port Authority defendants submit that the indicia leading Erickson to a determination of probable cause included: Revell's failure to respond to questions regarding the legality of Revell carrying a handgun in Pennsylvania (his final destination); the overnight break in Revell's airline travel during which his luggage was accessible to him at the Sheraton hotel; and Revell's statement that he planned to use the handgun for "personal protection" while traveling.

The Port Authority defendants' most persuasive argument that Erickson had probable cause to arrest Revell is that Erickson grew suspicious that Revell's conduct fell outside of the protective ambit of 18 U.S.C. § 926A because he left the airport with the luggage for an overnight stay at a Newark hotel. The record supports defendants' assertion that Erickson was concerned that Revell had ready access to the firearm

and ammunition during the preceding night, which meant Revell would be in violation of at least two New Jersey Statutes. From Erickson's deposition testimony it is clear he knew that Revell spent the night with his luggage (containing the handgun and ammunition) in a Newark hotel.

> Q. He told you that he picked up the bag at Newark because he missed his flight, and went of the airport, correct?
>
> A. Yes.
>
> Q. And did he tell you that he went to a hotel that night?
>
> A. Yes.

(Erickson Dep. Trans. 65:13-20.) Erickson testified that he believed he had probable cause notwithstanding § 926A due to Revell's possession of hollow-nose ammunition: "The fact that he had the hollow-nosed bullets, and the circumstances that he had, we had to believe that he had the weapon readily available to him, you know, overnight in the hotel. All of these circumstances lead us to believe we have enough probable cause." (Erickson Dep. Trans. 72:15-22.)

Revell's arguments on this point attempt to reframe the dispute into whether Erickson knew "what, if anything, Revell did with his bag when he went to the hotel." (Revell Br. 17.) Revell counters that his pleadings indicate that he "did not open either of

the locked hard case containers while he was in New Jersey" (*id.* (quoting Am. Compl. ¶ 13)), and, argues that Erickson had "no basis to conclude that Revell's firearm was 'readily accessible' to him." (Id.) Revell chooses to focus on Erickson's questions as to where Revell intended to use the handgun for protection, arguing that the correct answers would not have suggested the handgun was readily accessible during the trip to New Jersey. But this ignores the fact that the handgun was accessible to Revell from the time he left Newark Airport after the cancellation of his flight to the time he returned the next day. Revell's unsupported assertion that he did not open the gun or ammunition containers in New Jersey is irrelevant to whether Erickson had probable cause to suspect the weapon and bullets were readily accessible. Moreover, nothing in the pleadings or the record indicates that Revell's handgun and ammunition were anything but readily accessible to him during his overnight stay in New Jersey. Revell does not allege, for instance, that the keys to his locked hard cases were held by Port Authority Police, or that the cases were held in safekeeping by TSA or Port Authority officials overnight.

In addition, Erickson was not constrained to believe Revell's responses to his questions during their airport encounter, especially because Revell's responses did not satisfy Erickson?s suspicion as to whether laws had been violated. In *Torraco v. Port Authority of New York & New Jersey*, 539 F.Supp.2d 632 (E.D.N.Y.2008), the court considered questioning by an airport police officer of an individual transporting a handgun who claimed the protection of

§ 926A. The court concluded that "[a] reasonable officer, even one aware of *§ 926A*, would be fully justified in not accepting plaintiff's explanation at face value. This is because *§ 926A* itself does not answer the question; it requires confirmation of a particular set of facts, which a police officer is not obligated to accept from the mouth of the suspect." *Id.* at 650.

Moreover, § 926A does not address anything but vehicular travel; it does not encompass keeping the weapon-locked in a case or not-in an airport hotel overnight. For that reason, Revell's amendment to his complaint wherein he asserts that his encased handgun and ammunition were transported from Newark Airport to the Sheraton in a van's inaccessible cargo area is without force for purposes of the probable cause analysis. It may very well be that Revell could not access his luggage during his ride in the shuttle van-but he assuredly could have later, when it was with him during his hotel stay.

Revell also attempts to draw on inapposite Supreme Court precedent arising from enforcement of the Civil Rights Act of 1964 to show that his stay at the hotel did not constitute a "break in travel." To support his point, Revell cites *Atlanta Motel v. United States*, 379 U.S. 241 (1964), which stands for the proposition that a hotel can be regulated as part of interstate commerce under the Commerce Clause. To apply the *Atlanta Motel* precedent to the § 926A framework, as Revell suggests, would stretch § 926 too thin. Section 926A plainly discusses the transportation of firearms through a state; it does not contemplate a firearm transporter staying for any period of time in a

state with an unlicensed firearm in luggage within that transporter?s unsupervised possession.

Even if Erickson's understanding of any of the facts was mistaken, however, the probable cause he developed to arrest Revell is not diminished, as "[p]robable cause does not demand any showing that a good-faith belief be correct, or more likely true than false." *Torraco*, 539 F.Supp.2d at 647.

The Court finds as a matter of law that Port Authority defendants' arrest of Revell does not offend the Fourth Amendment because probable cause developed during the arresting officer's questioning concerning Revell's transportation of a handgun and ammunition through New Jersey. This ruling makes it unnecessary for the Court to address whether or not § 926A pre-empts New Jersey's ban on possession of hollow point bullets.

B. Qualified Immunity

The Port Authority defendants also argue that Erickson is entitled to qualified immunity as a matter of law in arresting Revell because his actions did not offend the Constitution and were not objectively unreasonable. Although the Court has determined probable cause existed to arrest Revell, the question of qualified immunity will also be determined as an alternative ground for the Court's decision.

"[A]ny claim of qualified immunity must be resolved at the earliest possible stage of litigation." *Miller v. Clinton County*, 544 F.3d 542, 547 (3d

Cir.2008). Under the doctrine of qualified immunity, officers performing discretionary functions are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity analysis is a two-pronged test. A court must first ask whether the facts alleged, viewed in the light most favorable to the party asserting the injury, show that the officer's conduct violated a constitutional right? *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Then, only if the court answers the threshold question affirmatively should it proceed to the second prong and determine whether the right was clearly established, i.e., "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* Thus, the Court must first determine whether a constitutional infringement has been satisfactorily alleged to create a genuine issue of material fact.

The Port Authority defendants "are entitled to qualified immunity here if a reasonable officer could have believed that probable cause existed to arrest [defendant] in light of clearly established law and the information the arresting officers possessed." *Blaylock v. City of Philadelphia*, 504 F.3d 405, 411 (3d Cir.2007) (internal citation and quotation omitted). Here, Erickson demonstrated awareness of the clearly established New Jersey statutes prohibiting unlicensed handguns and hollow-nose ammunition during the airport encounter. Further, although Erickson did not possess full information about Revell's planned driving route from Pennsylvania to

Utah (*i.e.* the states through which Revell planned to drive), Erickson did learn of Revell's plans to use the gun for "protection" and that Revell had left the airport on the previous night with the unlicensed handgun and ammunition. Because, "in a qualified immunity case, the question of probable cause to arrest is an objective inquiry that does not depend on the officers' subjective motivations," the inquiry can end there. See *Blaylock*, 504 F.3d at 411 n. 5. Thus, by virtue of Erickson having probable cause to arrest Revell, Erickson is entitled to qualified immunity and the Court need not reach the second prong.

C. Due Process Claim Against Port Authority Under § 1983

Count Two of the amended complaint addresses the adequacy of the Port Authority?s post-deprivation due process, seeking damages for "depriv[ing] Revell of property without due process of law pursuant to the established policy of Defendant Port Authority[.]" (Am.Compl.¶ 39.) Thus, Revell is seeking damages for the taking of his property during the arrest and failing to return it. In his amended complaint, Revell had also sought injunctive relief ordering that his seized property be returned to him, but voluntarily dismissed Count Three for injunctive relief on July 24, 2008 after Port Authority returned his gun, ammunition, and holster. (D.E. 101.)

That the seizure of Revell's weapon, ammunition, and holster took place in the context of an arrest means that Revell is entitled to post-deprivation procedures to satisfy due process.

Where, as here, the necessity of quick action makes a pre-deprivation remedy impracticable, the Due Process Clause requires only that States provide an adequate post-deprivation remedy. *Parratt v. Taylor*, 451 U.S. 527, 539-41 (1981). As the Court previously ruled in its June 29, 2007 opinion, in cases of random or unauthorized deprivations, the availability of a State law tort action against the rogue State officer in State court qualifies as an adequate post-deprivation remedy. (D.E.38); see also *Parratt*, 451 U.S. at 543.

Revell argues that the option of requesting that Essex County release his property was not an adequate post-deprivation remedy because it was not a statutorily-created means of redress. (Revell Br. 28.) Interestingly, it appears that such a simple request to Essex County is precisely what led to the return of Revell's seized property. Critically for purposes of Count Two, however, Revell did not file a state court tort suit for return of his seized property. Revell cannot recover for inadequacy of post-deprivation remedies because the option of commencing a state court lawsuit was available to him at all times, which satisfies Revell's right to due process. Accordingly, the Court grants summary judgment of dismissal as to Count Two.

D. "Prison Claim"

Revell clarifies in his papers that he is not alleging a "prison claim" under the Eighth Amendment, but only seeks to "recover against the Port Authority for injuries suffered at the Essex County Jail as part of his compensation for the arrest."

(Revell Br. 32.) Without commenting on the availability of damages on this theory, the Court has found that probable cause existed for Revell's arrest. As such, he is not entitled for damages related to his detention at Essex County Jail.

E. The Remaining Motions

Because the Court grants Port Authority defendants' motion for summary judgment, it need not decide third-party defendant Essex County's motion to dismiss in lieu of answering and third-party defendant Continental's motion for summary judgment, and they are both denied as moot. All third-party claims are dismissed as moot.

IV. CONCLUSION

For the foregoing reasons, Count One of Revell's complaint is dismissed because probable cause existed for Revell's arrest. Revell's only remaining claim, Count Two, is likewise dismissed because New Jersey afforded adequate post-deprivation due process to Revell. The motions of Essex County and Continental are denied as moot, as there is no liability for the actions of the Port Authority defendants, and all third-party claims are, accordingly, dismissed. An appropriate order will be entered.

/s/ Katherine S. Hayden
Katherine S. Hayden, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GREGG C. REVELL,

Plaintiff,

v.

Civ. Action
No. 06-402 (KSH)

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY and SCOTT ERICKSON,

Defendants and Third-Party Plaintiff

ORDER

v.

CONTINENTAL AIRLINES, THE COUNTY OF ESSEX, THE ESSEX COUNTY JAIL, THE OFFICE OF THE ESSEX COUNTY PROSECUTOR et al.

Third-Party Defendants.

Katherine S. Hayden, U.S.D.J.

For the reasons stated in the opinion filed herewith,

IT IS on this 31st day of March, 2009,

ORDERED that Port Authority's cross-motion for summary judgment is granted (D.E. 93), dismissing the remaining counts, counts one and two, of Revell's complaint; and it is further

ORDERED that the motions of Essex County (D.E. 92) and Continental (D.E. 97, 106) are denied as moot; and it is further

ORDERED that the Clerk of Court shall mark the matter closed.

/s/ Katherine S. Hayden
Katherine S. Hayden, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NOT FOR PUBLICATION

GREGG C. REVELL and
ASSOCIATION
OF NEW JERSEY
RIFLE AND PISTOL
CLUBS, INC.,

Plaintiffs,

v.

Civil Action
No. 06-402 (KSH)

PORT AUTHORITY OF
NEW YORK AND NEW
JERSEY, et al.,

Defendants.

OPINION

KATHARINE S. HAYDEN, U.S.D.J.

In this § 1983 case, Plaintiff Gregg Revell ("Revell") claims that Port Authority Police Officer Scott Erickson ("Erickson") and the Port Authority of New York and New Jersey ("the Port Authority") violated his rights, privileges, or immunities secured by 18 U.S.C. § 926A when Erickson arrested him in Newark Liberty International Airport in Newark, New

Jersey for possession of a firearm without a license and for possession of hollow point bullets. Revell also claims that Erickson and the Port Authority violated his Fourteenth Amendment right to due process of law by retaining, without providing notice and an opportunity to be heard, the firearm, holster, locks, hard case containers and ammunition seized from him during the arrest. Revell seeks both monetary and injunctive relief. Plaintiff Association of New Jersey Rifle and Pistol Clubs, Inc. (the "Association"), a non-profit membership corporation organized to protect the rights of its members and the public to possess and carry firearms and ammunition, seeks purely injunctive relief in the form of an order enjoining Erickson and the Port Authority from enforcing certain New Jersey gun laws against non-resident Association members who are transporting firearms and ammunition through New Jersey in compliance with § 926A.

Erickson and the Port Authority have moved to dismiss the complaint on several grounds. For the reasons explained more fully below, the motion is **granted**, and Revell is given leave to amend Counts One, Two, and Three of the complaint.

I. STANDARD

Erickson and the Port Authority filed a joint motion for dismissal.[1] Revell's complaint can only be

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[1] Technically, because the Port Authority filed a responsive pleading prior to filing this motion and Erickson did not, they have filed for dismissal under different rules of

dismissed "if it appears to a certainty that no relief could be granted under any set of facts which could be proved." D.P. Enters., Inc. v. Bucks County Cmty. Coll., 725 F.2d 943, 944 (3d Cir.1984). Moreover, the court must accept all well-pled factual allegations as true and must construe the complaint in the light most favorable to the plaintiff. Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts, Inc., 140 F.3d 478, 483 (3d Cir.1998).

II. FACTUAL BACKGROUND[2]

On March 31, 2005, Revell, a resident of Utah, checked in with Northwest Airlines at the Salt Lake City Airport. His destination was Allentown, Pennsylvania, via Minneapolis/St. Paul and Newark, New Jersey. When he checked in, Revell declared that his bag contained an unloaded firearm in a locked hard case container and ammunition in a separate locked hard case container. Revell signed an orange firearm declaration tag, which was placed inside the container holding the firearm.

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procedure. Fed.R.Civ.P. 12(b)(6) authorizes a defendant to file a pre-answer motion to dismiss for "failure to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(c), on the other hand, permits a defendant who has already filed an answer to file a motion for judgment on the pleadings. As a result, the Port Authority's motion is made pursuant to Rule 12(c), while Erickson's motion is made pursuant to Rule 12(b)(6) The difference is purely semantic, however, because the standard is the same for both rules. Turbe v. Government of the Virgin Islands, 938 F.2d 427, 428 (3d Cir.1991).

[2] The factual background comes from the complaint.

Revell's flight to Newark was late and he missed his connecting flight to Allentown. After waiting five hours inside the secure area of the airport, he was directed to board a bus that would drive him and other passengers to Allentown. After taking his seat on the bus, Revell learned from the driver that his checked luggage had not been placed on the bus, so he got off to search for his bag. By the time Revell found it in the lost luggage area of Newark Airport, the bus to Allentown had already left. An airline employee told him that the airline's computer system showed that although he had checked the bag through to Allentown, the airline had mistakenly tagged his bag with Newark as its final destination. As there were no other connections to Allentown that night, Revell took his bag and stayed overnight at a nearby hotel.

The next morning, Revell went directly to Newark Airport. At the airline check-in counter, he once again declared that he had a firearm and ammunition in his bag and that they were stored in separate locked hard case containers. Revell signed a white form and was directed to an x-ray area, where he again declared the firearm and ammunition. After his bag went through the x-ray machine, an agent at the end of the machine opened the cases using Revell's key. The orange firearm declaration from Revell's Salt Lake City check-in was still in the firearm container. After approximately 20 minutes, several police officers escorted Revell to a different area of the airport where they questioned him about the firearm and ammunition. Revell showed them his Utah concealed firearm permit and driver's license, and explained that he was simply traveling through New Jersey from

Utah and that he was on his way to Pennsylvania.

It is unclear exactly when Officer Scott Erickson appeared on the scene, but he ultimately arrested Revell for possession of a handgun without a permit in violation of N.J.S.A. § 2C:39-5(b) and for possession of hollow point ammunition in violation of N.J.S.A. § 2C:39-3(f). Revell's firearm, ammunition, holster, locks, and hard case containers were seized, and he was charged with unlawful possession of a handgun without a permit and unlawful possession of hollow point ammunition. He was handcuffed, placed in a police car, and held overnight in the Port Authority jail. The next day, Revell was transported to the Essex County Jail, where he was detained for three days. Ultimately, some four months later, on August 2, 2005, the Essex County Prosecutor administratively dismissed all charges. As of the date of filing the complaint, the firearm, ammunition, holster, locks, and hard case containers had not been returned.

The complaint includes four counts brought pursuant to 42 U.S.C. § 1983. In Count One, Revell claims that he is entitled to $3 million in damages because Erickson and the Port Authority, acting under color of State law, deprived him of his federal right to transport firearms and ammunition through states where possession of such items might otherwise be illegal, as guaranteed by 18 U.S.C. § 926A. In Count Two, Revell claims that he is entitled to $100,000 in damages because Erickson and the Port Authority, acting under color of State law, deprived him of his property without due process of law as guaranteed by the Fourteenth Amendment to the United States

Constitution. In Count Three, Revell seeks injunctive relief in the form of an order directing Erickson and the Port Authority to return his property. In Count Four, the Association seeks an injunction enjoining Erickson and the Port Authority from enforcing N.J.S.A. §§ 2C:39-5(b) and 2C:39-3(f) against its non-resident members who are entitled to transport a firearm and ammunition through New Jersey pursuant to 18 U.S.C. § 926A.

III. ANALYSIS

Revell seeks to recover monetary damages and injunctive relief pursuant to 42 U.S.C. § 1983 for a violation of a statutory right secured by 18 U.S.C. § 926A[3] and for violation of his right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution. To properly assert a § 1983 claim, the complaint must allege (1) "a violation of a right secured by the Constitution or laws of the United States," and (2) "that the alleged deprivation was committed by a "person" acting under color of State law." West v. Atkins, 487 U.S. 42, 48 (1988).

A. Count One-Does § 1983 provide Revell a remedy for a violation of 18 U.S.C. § 926A?

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[3] Revell's brief in opposition to the motion to dismiss specifies that he is not suing for a violation of his Fourth Amendment right to be free from unreasonable searches and seizures "Indeed, the Fourth Amendment is not even mentioned in the complaint. Rather, Revell seeks to recover under 42 U S.C Section 1983 for violation of a statutory right secured by 18 U S C. § 926A . " (Pl.'s Br. at 1)

It is well-settled that violation of a federal statute by a person acting under color of State law is insufficient, on its own, to support an action under § 1983. Blessing v. Freestone, 520 U .S. 329, 340 (1997); Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 105-106 (1989). Such a lawsuit is only permissible if (1) the statute creates enforceable rights, privileges, or immunities; and (2) Congress has not, either expressly or impliedly, foreclosed a private remedy. Three Rivers Ctr. for Indep. Living v. Hous. Auth., 382 F.3d 412, 421-22 (3d Cir.2004). As a threshold jurisdictional matter, the Court must determine whether 18 U.S.C. § 926A created an enforceable personal right. This appears to be an issue of first impression.

Whether § 1983 provides a remedy for violation of a federal statute, is a separate, but overlapping, inquiry from whether the statute creates an implied private right of action. Three Rivers Ctr. for Indep. Living, 382 F.3d at 421. The Supreme Court has instructed that four factors must be considered in determining whether a federal statute provides a private right of action:

> First, is the plaintiff one of the class for whose especial benefit the statute was enacted-that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative

> scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cannon v. University of Chicago, 441 U.S. 677, 689 n. 9 (1979) (internal citations and quotations omitted). However, because § 1983 by its very terms provides a private remedy, the analysis for determining whether an individual may sue for violation of a federal statute pursuant to § 1983 is slightly different. Three Rivers Ctr. for Indep. Living, 382 F.3d at 421.

> The threshold question remains, however, whether the federal statute creates a personal right-i.e., a plaintiff must show that the statute creates enforceable rights, privileges, or immunities within the meaning of § 1983. Once the plaintiff establishes the existence of a federal right, there arises a rebuttable presumption that the right is enforceable through the remedy of § 1983. This presumption may be rebutted by showing that Congress specifically foreclosed a remedy under § 1983, either expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.

Id. at 421-22 (internal citations and quotations omitted).

The federal statute involved here, 18 U.S.C. § 926A, states in relevant part:

> Notwithstanding any other provision of any law or any rule or regulation of a State or any political subdivision thereof, any person ... shall be entitled to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle: Provided, that in the case of a vehicle without a compartment separate from the driver's compartment the firearm and ammunition shall be contained in a locked container other than the glove compartment or console.

18 U.S.C. § 926A (2006). The statute was enacted in 1986 as part of the Firearms Owners Protection Act ("FOPA") to enable individuals to transport firearms through a State, even if possession of the firearm in that State would otherwise be illegal.

FOPA was a comprehensive statute that attempted to fix perceived problems with the Gun Control Act of 1968. During a debate on the Senate floor over the bill, Senator Bob Dole stated:

> The Firearms Owners Protection Act would correct various abuses which have occurred under the Gun Control Act of 1968. The 1968 law was passed during an emotional period, when the Nation was reacting to two political assassinations. The national judgment at that time was to take away rights enjoyed by many in order to prevent a recurrence of the outrageous abuses of a few. Each year's experience under the law brought with it new evidence that Congress had gone too far. Hunters, [s]portsmen, hobbyists, and collectors were being prosecuted for technical violations, diverting limited law enforcement resources from the pursuit of those guilty of truly criminal firearms use.
>
> S. 49 [FOPA] is the culmination of 7 years of painstaking debate and analysis over the deficiencies in the 1968 law and how they can be best corrected.

132 Cong. Rec. S5358-04 (daily ed. May 6, 1986).

When the bill was first circulated, FOPA caused serious concern among the law enforcement community. Had FOPA been passed in its original

form, the "legislation would [have] exempt[ed] the transport of firearms in interstate commerce from any State or local laws that might otherwise make such transport illegal, thereby overriding States' rights to regulate gun carrying across their borders, and allowing criminals the opportunity to transport their weapons across State lines with impunity." Id. (statement of Sen. Daniel Patrick Moynihan). To allay these concerns, Senator Strom Thurmond proposed the statute that was ultimately passed, known colloquially as both the "Thurmond Amendment" and "Son of Gun." The new language closed the loophole by limiting the right to travel interstate with firearms to situations where the firearm was unloaded, the firearm was not readily accessible, and any ammunition was stored separately.

During debate, Senator Jim McClure discussed the need for law abiding individuals to travel interstate with their firearms:

> I believe that the Second Amendment means exactly what it says. I believe that our forefathers intended for all honest citizens to be able to arm themselves. This is not a privilege meted out by the Government-it is a sovereign right, belonging to the people themselves.... Under present law, there is no legal way for a person to transport firearms through some States. For example, a hunter from South Carolina has no way of getting through the State of New York to go moose hunting in Maine. The

> Firearm Owners Protection Act would allow an individual to transport a firearm through the State if the firearm is unloaded and not easily accessible. The possession of the firearm must be legal both in the State of residence and in the State of final destination.... This right of transportation does not hinder a State from enacting laws concerning intrastate transportation.... Each year thousands of law abiding citizens travel on interstate trips with firearms for hunting purposes, competitions, matches, moving residences, and personal protection upon arrival. There must be some way for law-abiding Americans to exercise the right to interstate travel with personally owned firearms.

132 Cong. Rec. S5358-04 (daily ed. May 6, 1986) (emphases added). Speaking out in favor of the proposed bill on the House floor, Representative Bill McCollum described § 926A as a "safe harbor" provision, rather than as a statute creating an affirmative right. 132 Cong. Rec. H4102-03 (daily ed. June 24, 1986). He noted:

> No one is required to follow the procedures set forth in section 926A, but any traveler who does cannot be convicted of violating a more restrictive State or local law in any jurisdiction through which he travels. Thus, section 926A will be valuable to the person who

> either knows he will be traveling through a jurisdiction with restrictive laws or is unfamiliar with the various laws of the jurisdiction he will be traversing.
>
> Many times people traveling in interstate commerce can unwittingly find themselves in violation of all kinds of technical requirements for possession of firearms.

Id.

The legislative history shows that the statute was passed as a compromise that balanced the needs of certain individuals to travel across state lines with firearms with the needs of States to keep illegal guns out of the hands of criminals. Effectively, Congress passed a statute, codified as § 926A, that trumps State gun laws under limited circumstances, but that does not preempt all State regulation of firearms, City of Camden v. Beretta U.S.A. Corp., 81 F.Supp.2d 541, 549 (D.N.J.2000) (Simandle, J.), leaving the States with the power to regulate firearms and to prosecute individuals who violate State gun laws. Section 926A, therefore, places police officers in the unenviable position of having to determine in the first instance whether an individual should be arrested for violation of a State gun law, or whether the individual's actions are immunized by compliance with § 926A.

Revell's lawsuit presents a situation where an individual has complied with the requirements of § 926A and is nonetheless arrested for violation of an

otherwise valid State gun law. Arguably, there is a violation of § 926A if he has complied with § 926A and is nonetheless detained by the police and/or arrested, and/or if the firearms are seized. But the § 926A violation is a subsection of the main event: seizures that are arguably "unreasonable" have occurred, and this necessarily directs a Fourth Amendment analysis to determine if he was stripped of "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

Revell seeks a statutory route toward relief, but inescapably, the legal inquiry draws on established legal principles of constitutional law enforcement activity. Thus: "[A] warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." Devenpeck v. Alford, 543 U.S. 146, 152 (2004) (citing United States v. Watson, 423 U.S. 411, 417-24 (1976); Brinegar v. United States, 338 U.S. 160, 175-76 (1949)). If a law enforcement officer arrests an individual without probable cause, the officer may be liable under § 1983. Atwater v. City of Lago Vista, 532 U.S. 318 (2001). Furthermore, the filing of criminal charges against an individual without probable cause is also actionable under § 1983. Lohman v. Twp. of Oxford, 816 F.Supp. 1025 (E.D.Pa.1993).

The Supreme Court has specifically held that all § 1983 claims alleging an unlawful seizure must be brought pursuant to the Fourth Amendment. Graham v. Connor, 490 U.S. 386, 395 (1989) (holding that

"[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment ... must be the guide for analyzing these claims"). While the FOPA provision at issue in this case might be properly considered as a factor weighing on reasonableness, it does not provide greater protection from arrest than the Fourth Amendment already provides, nor under the strictures of Graham v. O'Connor, may it substitute for Fourth Amendment analysis.

By passing § 926A, Congress was attempting to protect law abiding gun owners from prosecution without diluting the States' abilities to prosecute criminals using guns for illicit purposes. Because individuals already have a method of recovering damages pursuant to § 1983 if they are arrested or charged without probable cause, it is unnecessary and, indeed, improper for this Court to conclude that § 1983 provides a separate or alternative remedy for a violation of § 926A. Subjecting law enforcement officers to § 1983 liability for unlawful arrests over and above the Fourth Amendment's reasonableness inquiry risks an impact on the enforcement of a given State's gun laws, something that motivated Congress's insistence on the Thurmond Amendment in the first place.

Revell carefully drafted his complaint to avoid mention of the Fourth Amendment, and specifically points out in his brief that he is <u>not</u> raising a Fourth Amendment claim. But he is seeking to recover damages for the unconstitutional seizure of his person

and his firearm under circumstances that require a classic reasonableness analysis. Nothing in the statute or legislative history would support a finding by this Court that by passing the FOPA provision at issue, Congress intended to provide firearms-transporting individuals with separate protection against arrest and seizure of property from what the Fourth Amendment already provides. Therefore, Count One of Revell's complaint is **dismissed**.

Because, as the foregoing analysis indicates, the facts alleged could be sufficient to state a § 1983 claim for an unreasonable arrest and seizure of property in violation of the Fourth Amendment, Revell is granted 20 days leave to file an amended complaint.

B. Counts Two and Three-Due Process Claims

In Counts Two and Three, Revell claims that defendants, acting under color of State law, have deprived him of his property (firearm, ammunition, holster, locks, and hard case containers), without due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. The complaint states: "Defendants ... deprived Revell of property without due process of law by retaining, without notice and opportunity for a hearing, the firearm, holster, locks, hard case containers, and ammunition seized from him." (Compl. at ¶¶ 36, 43.) Both counts are brought pursuant to § 1983, the only difference being that Revell seeks monetary damages in Count Two and injunctive relief in Count Three.

The most natural reading of the complaint is

that Revell is asserting a procedural due process claim based on defendants' failure to return his firearm, ammunition, holster, locks, and hard case containers to him. However, because Revell does not explicitly state whether his due process claim is of the procedural or substantive variety, the Court will analyze his claim as if he has asserted both.

1. Procedural Due Process

Under the Fourteenth Amendment, a State may not "deprive any person of life, liberty, or property, without due process of law." A procedural due process claim is analyzed under a two-part inquiry: the Court must determine whether Revell "was deprived of a protected interest, and if so, what process was his due." Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982). The second prong bars a § 1983 suit if a constitutionally adequate State process was available but not used. Parratt v. Taylor, 451 U.S. 527, 541-42 (1981).

The Supreme Court explained in Board of Regents v. Roth, 408 U.S. 564, 577 (1972), that property interests "are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law...." It is not disputed that Revell enjoyed a property interest in items seized and subsequently retained by defendants, so the issue is what process he was due.

"Usually, the process that is constitutionally 'due' must be afforded before the deprivation

occurs-the state must provide predeprivation process." Brown v. Muhlenberg Twp., 269 F.3d 205, 213 (3d Cir.2001). However, when deprivation by a State official acting under color of law is "random and unauthorized" or if the necessity of quick action makes a predeprivation remedy impracticable, as is the case here, the Due Process Clause requires only that States provide an adequate postdeprivation remedy. Parratt, 451 U.S. at 539-41. In cases of random or unauthorized deprivations, the availability of a State law tort action against the rogue State officer in State court qualifies as an adequate postdeprivation remedy. Id. at 543.

While Revell has alleged that the Port Authority has a policy of arresting individuals in violation of 18 U.S.C. § 926A (Compl. at ¶ 17), he has not alleged that the Port Authority's postdeprivation remedies to recover a firearm seized during the course of an arrest are constitutionally inadequate. Revell also does not indicate whether or not he has availed himself of the Port Authority's remedies for the recovery of seized property or why these remedies are constitutionally inadequate. He simply claims that his "requests for return of the property have been ignored." (Compl. at ¶ 22.) To the extent that Revell has not availed himself of the Port Authority's formal procedures for requesting the return of seized property, his procedural due process claim must be dismissed for failure to state a claim because he has not shown that complying with the procedures would be futile. Insofar as Revell claims that Erickson's retention of his property is a random and unauthorized act and that Erickson is wrongly holding his property in violation of official Port Authority policy, this claim must also be

dismissed because Revell is capable of filing a State law tort action against Erickson in State court seeking the return of his property. Parratt, 451 U.S. at 543 (holding that in cases of random and unauthorized deprivations, the availability of a State law tort action in State court qualifies as an adequate postdeprivation remedy).

2. Substantive Due Process

To the extent that Revell is claiming that his arrest and the seizure of his property should be analyzed under a substantive due process standard, such a claim is foreclosed by the Supreme Court's decision in Graham v. Connor, 490 U.S. 386, 388 (1989). As noted above, the Graham Court held that "[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." Id. at 395.

For the foregoing reasons, Counts Two and Three are **dismissed** for failure to state a claim. Revell is granted leave to file an amended complaint within 20 days if he wishes to pursue a claim alleging that the Port Authority's postdeprivation remedies for the return of seized property are constitutionally inadequate.

C. Count Four-Injunctive Relief for the Association

In Count Four, the Association seeks an

injunction enjoining defendants from enforcing N.J.S.A. §§ 2C:39-5(b) (possession of a handgun without a permit) and 2C:39-3(f) (possession of hollow point ammunition) against its non-resident members who are entitled to transport a firearm and ammunition through New Jersey pursuant to 18 U.S.C. § 926A.

Defendants have not raised any arguments in support of dismissing this claim. However,

> those who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Art. III of the Constitution by alleging an actual case or controversy. Plaintiffs must demonstrate a personal stake in the outcome in order to assure that concrete adverseness which sharpens the presentation of issues necessary for proper resolution of constitutional questions. Abstract injury is not enough. The plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical.

City of Los Angeles v. Lyons, 461 U.S. 95, 101-102 (1983) (internal citations and quotations omitted).

In Lyons, the Court held that an individual who

was severely injured by the police after they subjected him to a choke hold during a traffic stop did not have standing to seek an injunction preventing the police from using the choke hold in the future. Id. at 105. In so holding, the Court stated that although

> Lyons may have been illegally choked by the police on October 6, 1976, while presumably affording Lyons standing to claim damages against the individual officers and perhaps against the City, does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part. The additional allegation in the complaint that the police in Los Angeles routinely apply chokeholds in situations where they are not threatened by the use of deadly force falls far short of the allegations that would be necessary to establish a case or controversy between the parties.

Id.

Under this standard, the Association does not meet Article III's injury in fact requirement to establish an actual case or controversy. Although the complaint summarily asserts that there "exists a credible threat of prosecution for violation ... [of these laws] for non-resident members of the Association who

intend to transport firearms and hollow point ammunition through New Jersey" pursuant to 18 U.S.C. § 926A," (Compl. at ¶ 52), the Association has failed to plead any fact in support. Because the Association cannot show a sufficient likelihood that its members will be injured in the future, its claim must be **dismissed** for failure to establish a case or controversy between the parties. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Lyons, 461 U.S. at 105.

IV. CONCLUSION

For the foregoing reasons, defendants' motion to dismiss is **granted**. Revell is granted leave to amend **Count One** to substitute a § 1983 claim for a violation of his Fourth Amendment rights in place of his § 1983 claim for a violation of 18 U.S.C. § 926A; and Revell is also granted leave to amend his complaint as to **Counts Two** and **Three** insofar as he wishes to claim that the Port Authority's postdeprivation remedies for property seized in connection with his arrest are constitutionally inadequate. An appropriate order will be filed.

Dated: June 29, 2007

/s/ Katherine S. Hayden
Katherine S. Hayden, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-2029

GREGG C. REVELL; ASSOCIATION OF NEW JERSEY RIFLE & PISTOL CLUBS INC.

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY; SCOTT ERICKSON

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Third Party Plaintiff

v.

CONTINENTAL AIRLINES; COUNTY OF ESSEX; ESSEX COUNTY JAIL; ESSEX COUNTY PROSECUTOR; JOHN DOES 1-10,

Third Party Defendants

Gregg C. Revell,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 06-cv-402)
District Judge: Honorable Katherine S. Hayden

SUR PETITION FOR REHEARING

Before: RENDELL and JORDAN, *Circuit Judges*, and PADOVA*, *District Court Senior Judge*

The petition for panel rehearing filed by Petitioner having been submitted to all judges who participated in the decision of this court, and a majority of the judges who concurred in the decision not having asked for rehearing, it is hereby ORDERED that the petition for panel rehearing is hereby DENIED.

BY THE COURT:
/s/ Kent A. Jordan
Circuit Judge

Dated: April 20, 2010
MB/cc: Richard E. Gardiner, Esq.
Donald F. Burke, Sr., Esq.

---

* Honorable John R. Padova, United States District Court Senior Judge, for the Eastern District of Pennsylvania, sitting by designation

No. 10-236

IN THE

Supreme Court of the United States

GREGG C. REVELL,

Petitioner,

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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SUMMARY OF ARGUMENT

The Court of Appeals for the Third Circuit ("Third Circuit") correctly affirmed the district court's granting summary judgment dismissing petitioner Gregg Revell's ("Revell") claim pursuant to 42 U.S.C. § 1983 that his Fourth Amendment rights as secured by the Fourteenth Amendment were violated by his arrest on April 6, 2005 at Newark Liberty International Airport ("Newark") for unlawful possession of a firearm and hollow-point bullets, because Revell did not fall under the protection of 18 U.S.C. § 926A, known as the Firearm Owners Protection Act ("FOPA"). This statute permits persons to travel between places where they lawfully possess a firearm through a jurisdiction where they might not lawfully possess it, provided they comply with certain conditions set forth in the statute. A key condition is that during transport, the firearm and ammunition are not "readily accessible" to the person traveling with them. Revell failed to comply with this condition when through a series of mishaps, he missed his airline connection and retrieved the gun and ammunition, which he then took to a hotel overnight before returning to the airport.

There was probable cause for his arrest when he arrived at the airport the next day to resume his trip, since it is undisputed that he told The Port Authority of New York and New Jersey (the "Port Authority") Police Officer Scott Erickson that he had stayed with his firearm and ammunition at an airport hotel. At the time of his arrest, Revell was in possession of a handgun for which he had no permit as required by N.J.S.A. § 26:39(b) and for possession of hollow-point bullets in violation of N.J.S.A. § 2C:39-3 (f).

The Third Circuit's ruling does not implicate Revell's Second Amendment rights because there is no claim that the New Jersey's gun laws being enforced were unconstitutionally restrictive or that the Third Circuit imposed conditions on Revell that were not expressly stated in the statute.

The claim for violation of Revell's due process rights based on the retention of his firearm and ammunition after the charges against him were dropped was also properly dismissed, since New Jersey provided adequate post-deprivation remedies, which he failed to use.

POINT I

THE THIRD CIRCUIT COURT OF APPEALS CORRECTLY AFFIRMED THE DISMISSAL OF REVELL'S CLAIMS BASED ON 18 U.S.C. § 926A AND THE FOURTH AMENDMENT SINCE ON THE PLEADINGS AND UNDISPUTED FACTS HE DID NOT FALL WITHIN THE PROTECTION PROVIDED BY THAT STATUTE

A) Procedural History

The district court dismissed Revell's first complaint based solely on 18 U.S.C. § 926A pursuant to F.R. Civ. P. 12(b)(6), but allowed him to replead under the Fourth Amendment and the Fourteenth Amendment (App. 49a–70a). Revell served an amended complaint alleging a violation of his Fourth Amendment right to be free from unlawful arrest and imprisonment and a violation of his due process right based on the retention of his property by police after the dismissal of the criminal action

against him on August 2, 2005. At the conclusion of discovery, the district court granted summary judgment dismissing the complaint on the ground that there was no violation of his Fourth Amendment right since there was probable cause for his arrest, and on the ground that there was no due process violation because there were adequate post-deprivation remedies (App. 26a-48a). The Third Circuit affirmed the decision of the district court on different grounds with respect to 18 U.S.C. § 926A, since the Third Circuit determined that Revell did not fall within the protection of this statute (App. 3a-25a).

B) The Standard of Review

This Court has held that on a motion to dismiss pursuant to Fed. R. Civ. P. 12 (b)(6), the pleadings must contain " 'something more . . . than a statement of facts that merely creates a suspicion [of] a legally cognizable right of action' ". *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 at 555 *citing* 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed. 2004) ("Wright v. Miller"). In *Twombly*, *supra*, this Court recognized that when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, 'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court." *Id.* at 558 *citing* 5 Wright & Miller § 1216 at 233-234.

At the summary judgment stage, this Court has held that the judge's function is not to weigh the evidence to determine the truth of the matter, but to determine whether there is a genuine issue for trial. *Anderson v.*

Liberty Lobby, 477 U.S. 242 (1986). As this Court stated in *Anderson*: "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which a jury could reasonably find for a plaintiff." *Id.* at 252. "[A] party opposing a properly supported motion for summary may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial." *Id.* at 256.

C) Dismissal of Revell's Claim Based On 18 U.S.C. § 926A Was Proper Since The Complaint Stated Facts Which Took Revell Outside The Protection of 18 U.S.C. § 926A

The federal statute involved here, 18 U.S.C. § 926A, which was enacted in 1986 as part of the FOPA to enable individuals to transport firearms through a state even if possession in that state would otherwise be illegal, provides in relevant part:

> Notwithstanding any other provision of any law or any rule or regulation of a State or any political subdivision thereof, any person ... shall be entitled to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm, if during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle: Provided, that

> in the case of a vehicle without a compartment separate from the driver's compartment the firearm and ammunition shall be contained in a locked container other than the glove compartment or console.

As the district court's comprehensive review of the legislative history of this bill discloses, the debate in the U.S. Senate focused on the right of law-abiding citizens to travel interstate with their firearms as long as they were not accessible. During the debate, Senator Jim McClure discussed the need for law abiding individuals to travel interstate with their firearms:

> I believe that the Second Amendment means exactly what it says. I believe that our forefathers intended for all honest citizens to be able to arm themselves. This is not a privilege meted out by the Government - it is a sovereign right, belonging to the people themselves.... Under present law, there is no legal way for a person to transport firearms through some States. For example, a hunter from South Carolina has no way of getting through the State of New York to go moose hunting in Maine. The Firearm Owners Protection Act would allow an individual to transport a firearm through the State if the firearm *is unloaded and not easily accessible.* The possession of the firearm must be legal both in the State of residence and in the State of final destination.... This right of transportation does not hinder a State from enacting laws concerning intrastate

> transportation.... Each year thousands of law abiding citizens travel on interstate trips with firearms for hunting purposes, competitions, matches, moving residences, and personal protection upon arrival. There must be some way for law-abiding Americans to exercise the right to interstate travel with personally owned firearms.

132 Cong. Rec. S5358-04 (daily ed. May 6, 1986) (emphasis added) (App. 59a)

Thus, the language in this statute which conditions the lawful transportation of a firearm on its being "unloaded", and on its being not "readily accessible" to the person transporting it.

Here, Revell alleged in his complaint that due to mistakes by the airline consisting of a missed flight connection from Newark, New Jersey to Allentown, Pennsylvania[1] and the failure to check his luggage through to Allentown, he spent the night at an airport hotel. It is undisputed that Revell alleged in the complaint that at Newark Liberty International Airport ("Newark"), he took possession of the two locked containers carrying his firearm and ammunition and

---

1. There is nothing on the record here that supports petitioner's assertion that he could lawfully possess his firearm in the State of Pennsylvania. Revell testified at his deposition that he did not check Pennsylvania law to ascertain whether he could carry a weapon there, and he only assumed he could because the instructor for his concealed firearms permit in Utah did not say he could not take the firearm to Pennsylvania (App. 6a n3).

transported them to a hotel at the airport where he spent the night (App. 17a). Revell further alleged that he returned to the airport the next day with the locked containers and that after his luggage passed through the TSA's x-ray screening, he gave the key to both containers to the TSA agent who opened the cases (App. 17a). The TSA agent then notified the Port Authority police and Police Officer Erickson responded. After questioning Revell, Police Officer Erickson arrested him for possession of a handgun without a permit in violation of N. J. Stat. Ann. § 2C:39-5(b)[2] and for possession of hollow-point ammunition in violation of N.J. Stat. Ann. § 2C:39-5(b).[3]

This Court has long held that statutes should be construed according to their plain meaning and to effectuate the intent of the legislature. *U.S., et al. v. American Trucking Ass'ns.*, 310 U.S. 534, 542-543 (1940); *Ardestanti v. I.N.S.*, 502 U.S. 129, 135 (1991). Petitioner's contention that the Third Circuit has misconstrued the terms "readily accessible" because his firearm and ammunition were locked in containers inside his luggage ignores the plain meaning of that language and the legislative purpose as articulated by Senator McClure. Once Revell was in the hotel room with his luggage, it defies reason to argue that he did

2. Section 2C:39-5(b) provides that "[a]ny person who knowingly has in his possession any handgun . . . without first having obtained a permit to carry the same as provided in N.J.S. 2C:58-4, is guilty of a crime" of the second or third degree depending on the nature of the handgun (App. 7a n4).

3. Section 2C:39-3(f) provides that "[a]ny person . . . who knowingly has in his possession any hollow nose or dum-dum bullet, . . . is guilty of a crime in the fourth degree.

not have ready access to the firearm and ammunition as he had the key to open the containers (App. 17a). Moreover, it is immaterial that Revell had the containers in his luggage, since he was spending the night at the hotel and it stands to reason that he opened his luggage to change clothes. The fact that he alleges that he did not open the locked containers is irrelevant to the question of whether they were readily accessible. The gun and the ammunition were readily accessible if Revell had the key and the locked containers with him at the hotel so that within seconds he could open the containers and load the firearm. The petitioner's reliance on *Thornton v. United States*, 541 U.S. 615 (2004) is misplaced since that case involves a firearm recovered during the search of an automobile which was incident to an arrest for possession of drugs that took place after the arrestee had exited his vehicle. In *Thornton*, this Court held that the Fourth Amendment did not require an officer to risk the suspects' accessing the vehicle to obtain a weapon or to destroy evidence merely because the critical contact had taken place outside the vehicle. *State v. Williams*, 636 P.2d 1092 (Utah 1981), which is also cited by petitioner is equally inapposite, as that case involved the appeal of a conviction for violating Utah's state statute prohibiting carrying a concealed weapon. In *State v. Williams, supra*, the Supreme Court of Utah affirmed the conviction for carrying a concealed weapon based on the fact that the defendant had a loaded handgun in a satchel on the passenger's front seat of his car. Nor is the Florida Statute § 790.001 (16) applicable here as petitioner argues, since that is a criminal statute where the defined term is "readily accessible for immediate use" as distinguished from merely "readily accessible" as used in FOPA.

As the Third Circuit recognized 18 U.S.C. § 926A "clearly requires a traveler to part ways with his weapon and ammunition during travel; it does not address this type of interrupted journey or what the traveler is to do in this situation." (App. 20a). The Third Circuit suggested that owners in Revell's situation go to law enforcement officials at the airport or airport personnel before retrieving their luggage and ask them to take custody of the firearm and ammunition until he can resume travel. Petitioner's rejection of this proposed solution on the ground that it might be a waiver of his Fifth Amendment rights is unfounded since air travelers with firearms in their check-in luggage are required under Transportation Security Administration ("TSA") regulation in any event to declare it to the airline personnel pursuant to 49 C.F.R. 1540.111(C)(2)[4]. Further, petitioner's contention that law enforcement would be forbidden from returning the firearm is based on a

4. 49 C.F.R. 1540.111 (C)(2) provides as follows:

> (i) The passenger declares to the aircraft operator, either orally or in writing before checking the baggage that any firearm carried in the baggage is unloaded;
>
> (ii) The firearm is carried in a hard-sided container;
>
> (iii) The container in which it is carried is locked, and only the individual checking the baggage retains the key or combination; and
>
> (iv) The checked baggage containing the firearm is carried in an area that is inaccessible to passengers, and is not carried in the flightcrew compartment.

misreading of N.J. Stat. Ann. § 2C:39-12[5] which provides for voluntary surrender of firearms and other prohibited items by residents for the purpose of avoiding prosecution for unlawful possession. Section 2C:58-3,[6] which petitioner also cites as prohibiting airport police from returning Revell's firearm and ammunition after taking custody of them addresses the purchase of firearms in New Jersey not the surrendering temporary custody. There is nothing in New Jersey's laws which would have prevented Revell from surrendering custody of his firearm on a temporary basis to the Port Authority Police or the TASA to remedy his predicament.

D) The Third Circuit Correctly Affirmed The Granting of Summary Judgment Dismissing The Claim For Violation Of Revell's Fourth Amendment Rights On The Ground That There Was Probable Cause For His Arrest

It is well settled that a warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe a criminal

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5. N.J. State Ann. 2C:39-12 titled Voluntary Surrender provides in relevant part "[N]o person shall be convicted of an offense under this chapter for possessing any firearms, weapons . . . if after giving written notice of his intention to do so, including the proposed date and time of surrender, he voluntarily surrendered the weapon . . . to the chief of police in the municipality in which he resides."

6. N.J. State Ann. 2C:58-3, titled Purchase of Firearms provides in relevant part that [N]o person shall sell, give, transfer, assign or otherwise dispose of, nor receive, purchase or otherwise acquire a handgun unless the purchaser . . . has first secured a permit.

offense has been or is being committed. *See United States v. Watson*, 423 U.S. 411, 417-424 (1976), *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004), Whether probable cause exists depends upon the reasonable conclusions to be drawn from the facts known to the arresting officer at the time of the arrest. *Maryland v. Pringle*, 540 U.S. 366 (2003).

Revell testified at his own deposition that upon missing his connecting flight to Allentown, he retrieved his luggage and took it to a nearby hotel (App. 18b). When he returned to Newark Airport the next day with his luggage containing the firearm and ammunition, they were revealed on the x-ray scanner to the TASA agent who summoned the Port Authority police. Police Officer Scott Erickson, who responded to the scene, testified that Revell acknowledged that he "had the firearm with him when he left for Newark, [and] that he had packed up the bag and taken it with him" (App. 18a). Police Officer Erickson was told by Revell that he had taken the bag with the firearm and ammunition to his hotel.[7] It was therefore undisputed that Revell had access to

7. The Third Circuit specifically noted that Erickson testified as follows:

> Q. He told you that he picked up the bag at Newark because he missed his flight, and went out of the airport,
>
> correct?
>
> A. Yes.
>
> Q. And did he tell you that he went to a hotel that night?
>
> A. Yes. (App. 18a)

his firearm and ammunition in a New Jersey hotel where he stayed for the night and that he communicated this fact to Police Officer Erickson before his arrest. Moreover, Police Officer Erickson observed Revell in possession of the firearm without New Jersey permit and hollow-point ammunition in violation of New Jersey Law. Since Revell was not within the protection afforded by § 926A[8] because his firearm and ammunition were readily accessible during his overnight stay at the hotel, Officer Erickson had probable cause to arrest him for unlawful possession of a firearm and hollow-point ammunition.

E) There Is No Substantial Question Presented For This Court As The Third Circuit's Ruling Does Not Impair Revell's Second Amendment Rights.

This Court in *McDonald v. Chicago, et al.*, No 08-1521 (June 28, 2010) held the Second Amendment applied to the states through the due process clause of the Fourteenth Amendment, and struck down a Chicago law banning handguns in the home. Petitioner's

8. The Third Circuit did not consider the question of whether 18 U.S.C. § 926 A gives rise to a right of action under 42 U.S.C. § 1983, and affirmed the district court's dismissal of this claim on the pleadings on the ground that Revell did not fall within the protection of § 926 A. While the district court ruled that § 926 A did not give rise to a cause of action because this Court ruled in *Graham v. Connor*, 490 U.S. 386 (1989) that all unlawful seizure claims must be brought pursuant to the Fourth Amendment, The Second Circuit in *Torraco v. The Port Authority of New York and New Jersey*, 615 F.3d 129 (2d Cir. 2010) held that § 926 A did not create a separate right because of the enormous practical problems it imposed on police officers in determining compliance.

contention that the Third Circuit's ruling infringes on Revell's Second Amendent rights is unfounded. Revell ran afoul of a New Jersey law, which with some exceptions, requires a person in possession of a gun to have a permit. He could only avoid prosecution under this law by complying with 18 U.S.C. § 926 A. Section 926A offers protection to the interstate traveler with a firearm who is passing through a state with restricted gun laws, but its protection is contingent upon compliance with the requirement that the firearm be kept so that it was not readily accessible. Revell failed to adhere to the conditions set forth in the statute, and thus is not entitled to maintain this action.

Moreover, Revell did not raise a Second Amendment issue below and should be precluded from raising it at this time. *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000).

Lastly, there is no substantial question for this Court because, as petitioner concedes, there is no conflict between the circuits with respect to the meaning of 18 U.S.C. § 926 A.

POINT II

THE SEIZURE AND RETENTION OF REVELL'S PROPERTY DID NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

It is well settled that law enforcement officers may seize property and specifically weapons incident to a lawful arrest without violating the Fourteenth Amendment's prohibition against depriving a person of property without due process of law. *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967); *Harris v. U.S.* 331 U.S. 145 (1947). The seizure of Revell's firearm and ammunition by the Port Authority police was lawful since as discussed *infra*, there was probable cause for his arrest.

A procedural due process claim is analyzed under a two-part inquiry: the court must determine whether *Revell* "was deprived of a protected interest, and, if so, what process was his due." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 at 428 (1982). The second prong bars a suit under 42 U.S.C. § 1983 if the deprivation was not caused by conduct pursuant to established state procedure and if there was an adequate available post-deprivation remedy. *Parratt v. Taylor*, 451 U.S. 527 (1981), *Hudson v. Palmer*, 468 U.S. 517 (1984).

Revell's due process claim, which is based on the retention of his firearm and weapon by Essex County for a period after the charges against him were dismissed, is deficient in that he failed to show:: 1) that there was an established procedure to retain property

under these circumstances; and 2) that the post-deprivation remedy was inadequate. Revell's reliance on the allegation in his First Amended Complaint that the Port Authority and Police Officer Erickson deprived him of property without due process "pursuant to an established policy" is misplaced (Petitioner's brief p. 26). The seizure of his property was lawful because it was pursuant to a valid arrest. Moreover, on summary judgment, Revell was required to identify a Port Authority policy or procedure that effectively prevented him from recovering his property, which he failed to do. Further, Revell was unable to show that the process provided by the state for recovering his property was not constitutionally adequate. *See Zinermon v. Burch*, 494 U.S. 113, 126 (1990) ("it is necessary to ask what process the state provided and whether it was constitutionally adequate"). Here, as the Third Circuit observed, Revell "failed to explain why New Jersey's state procedures to recover wrongfully seized property, such as the ability to move in the criminal actions for return of his property or the ability to file a separate action for a writ of replevin are insufficient" *citing State v. One 1986 Subaru*, 576 A.2d 859 (N.J. 1990) (the New Jersey Supreme Court held that since the owner of a property seized as evidence in a criminal proceeding can file a replevin or move to retrieve the property, his inaction weighs against a claim that his due process rights were violated) (App. 23a-24a). Nor, as the Third Circuit found, was Revell entitled to any special notice of these legal remedies. *See City of W. Covina v. Perkins*, 525 U.S. 234 (1999) (App. 24a). In *Covina*, this Court held that the due process clause does not "require [ ] a state or its local entities to give detailed and specific instructions or advice to owners who seek return of

property lawfully seized but no longer needed for police investigation or criminal prosecution." *Id.* at 236 (App. 24a).

Moreover, as the District Court pointed out, Revell ultimately recovered his property through the simple means of requesting its release from Essex County (App. 45a). Accordingly, there is no conflict between the Third Circuit's ruling in this case and the Court of Appeals for the District of Columbia's holding in *Ford v. Turner*, 531 A.2d 233 (D.C. 1987) because in that case, the plaintiff and her attorney had sent written requests to the Property Clerk to recover guns taken from her deceased sister's apartment which were not evidence in her sister's death but merely unregistered firearms to which she was entitled as administratrix. In *Ford*, the property clerk never notified plaintiff of the legal basis for the forfeiture or the continued retention of the guns. Even assuming *Ford*, *supra*, is good law in light of this Court's decision in *City of W. Covina v. Perkins*, *supra*, it is readily distinguishable from the instant case on the facts because Revell had no trouble recovering his property when he requested it.

CONCLUSION

This Court Should Deny This Petition For A Writ Of Certiorari To Review The Judgment Of The United States Court of Appeals For the Third Circuit.

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No. 10-236

IN THE
SUPREME COURT OF THE UNITED STATES

GREGG C. REVELL,

Petitioner,

v.

PORT AUTHORITY OF NEW YORK AND
NEW JERSEY; SCOTT ERICKSON

Respondents.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Notwithstanding Respondents' Brief in Opposition, the Petition should be granted. In addition to mischaracterizing portions of the record, Respondent's Brief in Opposition argues legal conclusions based on unwarranted speculation as to facts not in evidence, and disregards the legal standard entitling Revell to every favorable inference on a motion to dismiss. Morever, Respondents' argument ignores the sweeping impact of the court of appeals' decision on overnight travelers using all modalities of transportation, the effective nullification within the Third Circuit of the key protections Congress intended in 18 U.S.C. § 926A, and the creation of confusion as to the meaning of "readily accessible." The Petition should be granted so that these matters can be addressed by the Court.

The Petition should also be granted to resolve whether a government agency which seizes property must, under the Due Process Clause, initiate a forfeiture proceeding to retain the property once the property is not needed as evidence.

I.
REVELL'S FIREARM WAS NOT "READILY ACCESSIBLE" WITHIN THE MEANING OF 18 U.S.C. § 926A

1. Respondents mischaracterize the allegations of the complaint when they state:

> It is undisputed that Revell alleged in the complaint that at Newark Liberty

> International Airport ("Newark"), he took possession of the two locked containers carrying his firearm and ammunition and transported them to a hotel at the airport where he spent the night (App. 17a). Revell further alleged that he returned to the airport the next day with the locked containers and that after his luggage passed through the TSA's x-ray screening, he gave the key to both containers to the TSA agent who opened the cases (App. 17a).

Brief In Opposition 6-7.

As the court of appeals stated at the cited page of its opinion:

> He alleged that, "[a]fter retrieving his bag, because there were no more connections to Allentown until 9:45 a.m. the following morning ..., [he] went directly to, and stayed the night at, the Airport Sheraton Hotel." (App. at 23.) He further alleged that he returned with his luggage directly to the airport the next day and that a TSA agent, after x-raying the luggage, opened it with a key that Revell gave him.

App. 17a.

Accordingly, it was not "undisputed' that Revell "took possession of the two locked containers"; what

was undisputed was that he took possession of his *luggage* (in which were the two locked containers) and took his luggage to the hotel. Because the locked containers were in his luggage, the firearm and ammunition were not "readily accessible" within the meaning of 18 U.S.C. § 926A because he could not quickly reach inside the locked containers and withdraw the firearm for immediate use.

2. Respondents incorrectly assert that "[t]here is nothing on the record here that supports petitioner's assertion that he could lawfully possess his firearm in the State of Pennsylvania." Brief In Opposition 6, n.1. On the contrary, the record showed that Revell had a Utah permit to carry a firearm. App. 29a, 52a. Because he had a Utah permit, Revell could lawfully carry a firearm in Pennsylvania as a matter of law.

18 Pa. C.S.A. § 6106(a) provides in pertinent part:

> [A]ny person who carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license under the chapter commits a felony of the third degree.

18 Pa. C.S.A. § 6106(b) provides in pertinent part:

> (b) Exceptions. - The provisions of subsection (a) shall not apply to:

* * *

11) Any person while carrying a firearm in any vehicle, which person possesses a valid and lawfully issued license for that firearm which has been issued under the laws of the United States or any other state.

* * *

15) Any person who possesses a valid and lawfully issued license or permit to carry a firearm which has been issued under the laws of another state, regardless of whether a reciprocity agreement exists between the Commonwealth and the state under section 6109(k), provided:

> (i) The state provides a reciprocal privilege for individuals licensed to carry firearms under section 6109.
>
> (ii) The Attorney General has determined that the firearm laws of the state are similar to the firearm laws of this Commonwealth.

The Attorney General of Pennsylvania has determined that Utah has granted reciprocity to Pennsylvania license holders. See www.attorneygeneral.gov/crime.aspx?id=184. Thus, the record shows that Revll could lawfully carry a firearm in Pennsylvania.

3. The gravamen of Respondent's argument concerning whether Revell was in compliance with 18 U.S.C. § 926A is capsulized in the following statement:

> Once Revell was in the hotel room with his luggage, it defies reason to argue that he did not have ready access to the firearm and ammunition as he had the key to open the containers (App. 17a). . . . [S]ince he was spending the night at the hotel . . . it stands to reason that he opened his luggage to change his clothes.

Brief In Opposition 7-8.

The dismissal of Revell's claim under 18 U.S.C. § 926A was for failure to state a claim pursuant to Rule 12(b)(6). App. 17a, n.13. Accordingly, a court must "accept as true all of the factual allegations contained in the complaint." *Swierkiewicz* v. *Sorema N. A.*, 534 U.S. 506, 508, n.1 (2002). Further, "the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974).

Respondents' above statement is nothing more than blatant speculation which is not supported by the

express allegations of the complaint nor by a construction of those allegations favorable to the pleader. Indeed, to the contrary, Respondents essentially contend that the complaint must be construed as *unfavorably as possible* to Revell.

The only allegation concerning Revell's stay at the hotel was that Revell "stayed the night at, the Airport Sheraton Hotel." This allegation says nothing whatever concerning the location of the firearm while Revell was at the hotel, or what, if anything, Revell did with the firearm while he was in the hotel. Accordingly, the court of appeals could not have concluded that the firearm was "readily accessible" to Revell.

4. Respondents assert that the firearm and ammunition were "readily accessible":

> *if* Revell had the key and the locked containers with him at the hotel so that within seconds he could open the containers and load the firearm.

Brief In Opposition 8 (emphasis added).

Respondents thus acknowledge that the complaint does not allege the location of the firearm and ammunition while Revell was at the hotel. Accordingly, Respondents effectively acknowledge that the court of appeals could not have determined whether the firearm and ammunition were "readily accessible" while Revell was at the hotel. What Respondents are doing is arguing that, in a

hypothetical fact pattern -- *i.e.*, Revell had the key and the locked containers with him at the hotel, that the locked containers were accessible to him, and that the locks could be opened readily — the firearm and ammunition were "readily accessible." Whether or not these facts would support the conclusion that the firearm and ammunition were "readily accessible" to Revell, these facts are not alleged in the complaint, and a construction of the allegations of the complaint which is favorable to the pleader does not justify such facts.

In any event, to resolve the meaning of the term "readily accessible" as used in 18 U.S.C. § 926A, with respect to a stranded airline traveler whose luggage contains an unloaded firearm and ammunition in locked hard cases — and indeed with respect to all overnight travelers who must stay at a hotel during a continuous journey — this Court should grant the Petition.

5. Respondents argue that Revell's "reliance on *Thornton v. United States*, 541 U.S. 615 (2004) is misplaced" because that case involved an automobile search. Brief In Opposition 8. Respondents do not articulate the reason they believe that, because *Thornton* involved an automobile search, it is not helpful in understanding the meaning of the term "readily accessible." On the contrary, since 18 U.S.C. § 926A expressly includes transportation of firearms in automobiles, *Thornton* sheds light on the meaning of the term "readily accessible" as used in 18 U.S.C. § 926A. Notably, Respondents have offered no construction of the term "readily accessible" as used in

18 U.S.C. § 926A which contradicts *Thornton*'s reasoning.

6. Respondents argue that *State v. Williams*, 636 P.2d 1092 (Utah 1981), is "inapposite" because it involved the construction of a state statute prohibiting the carrying of a concealed weapon in an automobile. Brief In Opposition 8. Again, because 18 U.S.C. § 926A expressly includes transportation of firearms in automobiles, *Williams* is helpful in understanding the meaning of the term "readily accessible" as used in 18 U.S.C. § 926A. Moreover, Respondents have again offered no construction of the term "readily accessible" as used in 18 U.S.C. § 926A which contradicts *Williams'* reasoning.

7. In response to Revell's rejection of the court of appeals' suggestion that a person in Revell's situation "go[] to law enforcement representatives" and "request[] that his firearm and ammunition be held for him overnight" (598 F.3d at 137-138), Respondents argue that Revell's concern with waiver of Fifth Amendment rights is:

> unfounded since air travelers with firearms in their check-in luggage are required under Transportation Security Administration ("TSA") regulation in any event to declare it with the airline personnel pursuant to 49 C.F.R. 1540.111(C)(2).

Brief In Opposition 9.

The fact that air travelers are required to declare firearms in their checked luggage to *airline personnel* does not mitigate Fifth Amendment concerns with informing *state and local law enforcement officers* that a person has a firearm because declaring a firearm to airline personnel carries no risk of criminal prosecution (indeed, it is the fact of *not* so informing airline personnel that carries the risk of criminal prosecution), whereas informing state and local law enforcement officers in states like New Jersey that a person has a firearm will almost certainly, as Revell discovered, result in arrest and prosecution.

Respondents further argue that Revell "misreads" N.J. Stat. Ann. § 2C:39-12 (Brief In Opposition 10), but does not explain why. Respondents cannot provide such an explanation because there is none; § 2C:39-12 (which provides for the voluntary surrender of firearms) provides no mechanism for return of surrendered firearms. Similarly, Respondents assert that § 2C:58-3 does not prevent the return of firearms to a person in Revell's situation who temporarily surrendered them because § 2C:58-3 "addresses the purchase of firearms in New Jersey not the surrendering temporary custody." Brief In Opposition 10. The plain language of § 2C:58-3 belies that contention; § 2C:58-3 prohibits not only the sale of handguns, but broadly prohibits giving, transferring, assigning or otherwise disposing of a handgun.

9. Respondents assert that Revell contends that the court of appeals' decision "infringes on Revell's

Second Amendment rights" and that Revell is now precluded from raising this issue. Brief In Opposition 11. Revell does not now argue that the court of appeals' decision "infringes on" his Second Amendment rights. The Second Amendment was discussed in Revell's petition only for the purpose of showing that Congress exercised its power to deter violation of the right to keep and bear arms by the states through the enactment of 18 U.S.C. § 926A. Because the court of appeals has effectively rendered that exercise of power a nullity by applying the "readily accessible" exception in 18 U.S.C. § 926A where the facts before the court clearly did not justify application of the exception, this Court should grant Revell's petition to remedy the nullification of 18 U.S.C. § 926A.

II.
THE RETENTION OF REVELL'S PROPERTY WITHOUT NOTICE AND OPPORTUNITY FOR A HEARING VIOLATED THE DUE PROCESS CLAUSE

1. Respondents state that Revell "failed to show":

> 1) that there was an established procedure to retain property under these circumstances; and 2) that the post-deprivation remedy was inadequate.

Brief In Opposition 14-15.

In fact, the First Amended Complaint alleged to the contrary, *i.e.*, that "Defendants Port Authority of

New York and New Jersey and Scott Erickson deprived Revell of property without due process of law *pursuant to the established policy of Defendant Port Authority of New York and New Jersey.*" First Amended Complaint ¶ 39 (emphasis added).

In response to this plain and explicit allegation, Respondents argue that reliance on this allegation "is misplaced." Brief In Opposition 15. Respondents do not, however, even hint at why reliance on an undisputed allegation in the complaint is misplaced.[1] In fact, reliance on the allegation is *required* because Respondents' motion in the district court relied *solely* on the allegations in the First Amended Complaint in arguing that the First Amended Complaint did not state a cause of action.[2]

Respondents further argue that, "[o]n summary judgment, Revell was required to identify a Port Authority policy or procedure that effectively prevented him from recovering his property, which he failed to do." Brief In Opposition 15. Revell did so. He alleged, and Respondents did not dispute, that Respondents deprived Revell of his property without due process of law by:

---

[1] Indeed, it is disingenuous of Respondents to argue that Revell's reliance on the First Amended Complaint is misplaced when that is what Respondents relied on in their motion in the district court.

[2] Respondents argued that Revell has not been deprived of his property without due process because New Jersey had adequate post-deprivation remedies.

> retaining the firearm, holster, locks, hard case containers, and ammunition seized from him in that they did not provide him notice of the basis for the retention of the property and of an opportunity for a post-deprivation hearing.

First Amended Complaint ¶ 38.

Further, Revell alleged, and Respondents did not dispute, that such deprivation was "pursuant to the established policy of Defendant Port Authority of New York and New Jersey." First Amended Complaint ¶ 39.

Revell showed that the post-deprivation remedy was inadequate as he showed that the deprivation was a result of a government agency policy and not a random unauthorized deprivation of property.

2. Respondents argue that "Revell was unable to show that the process provided by the state for recovering his property was not constitutionally adequate." Brief In Opposition 15. The "process provided by the state" is either a motion in the criminal action for return of property or a separate action for a writ of replevin. Neither is constitutionally adequate because neither procedure requires the state to provide:

> notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and

> afford them an opportunity to present their objections.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

3. Respondents cite *State* v. *One 1986 Subaru*, 576 A.2d 859 (N.J. 1990) for the proposition that, "since the owner of a property seized as evidence in a criminal proceeding can file a replevin or move to retrieve the property, his inaction weighs against a claim that his due process rights were violated." Brief In Opposition 15. This statement is taken very much out of context. The context in which this statement was made was whether the initiation of a forfeiture proceeding was unconstitutionally delayed in light of *United States* v. *$8,850*, 461 U.S. 555 (1983), which discussed four factors to be weighed in determining whether delay in the initiation of a forfeiture action violates due-process rights: (1) the length of the delay; (2) the reasons for the delay; (3) whether the claimant has asserted his right to a hearing; and (4) whether the claimant has been prejudiced by the delay. In discussing the third factor, *One 1986 Subaru* stated:

> Claimants can file replevin actions to seek the return of seized property. . . . Similarly, if the seizure itself was improper, the seized property can be retrieved under the Rules of Criminal Procedure. . . . Because of the availability of procedures to recover seized property, a claimant's inaction *may* weigh against a claim that his or

> her due-process rights have been violated.

576 A.2d at 867 (emphasis added).

Thus, *One 1986 Subaru* was not determining whether New Jersey's procedures were constitutionally adequate — indeed, that could not have been an issue because it was a forfeiture action that was being litigated — but rather, in determining whether the action had been timely filed, *One 1986 Subaru* considered as one factor whether the claimant had taken any action to obtain return of his property.

It is ironic that Respondents cite to *One 1986 Subaru*, and thus to *United States* v. *$8,850*, because *United States* v. *$8,850* emphasizes the due process violation here. If a delay can be a violation of due process, then certainly a complete failure to initiate forfeiture is a violation of due process.

4. Respondents assert that Revell was not entitled to "any special notice of these legal remedies. See *West Covina v. Perkins,* 525 U.S. 234 (1999)." Brief In Opposition 15. Revell does not dispute that Respondents were not required to provide him with "notice of state-law remedies" (525 U.S. at 240) as he argues that it was the duty of Respondents, because they retained his property, to initiate a forfeiture proceeding, which included notice reasonably calculated to apprise him of the pendency of the action and to afford him an opportunity to present his objections, or to return the property.

5. Respondent states that "Revell ultimately recovered his property through the simple means of requesting its release from Essex County." Brief In Opposition 16. This is simply untrue. It was not until Revell filed this action (on January 27, 2006) seeking, *inter alia*, an order enjoining the Port Authority to return the property that it was returned (on July 24, 2008) — two and a half years after this action was filed and almost three years after the charges against Revell were dismissed (on August 2, 2005).

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

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